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No. 82-

In the Supreme Court of the United States

October Term, 1982

EDWARD COOPER, CITY ATTORNEY OF SANTA ANA, CALIFORNIA,

Petitioner,

vs.

MITCHELL BROTHERS' SANTA ANA THEATER, located at 1565 West 17th Street, Santa Ana, County of Orange, California; M.B.F.G. THEATER CIRCUIT, INC.; JIM GISH; ALLISON HONER CO., a partnership; UNITED ARTISTS THEATER CIRCUIT, INC.; CONTINENTAL AUXILIARY COMPANY, a California Corporation; BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a National Banking Association; JAMES MITCHELL; ARTIE MITCHELL; DEMICH, INC., a California Corporation; MITCHELL BROTHERS FILM GROUP, a General Partnership; CINEMA 7, INC., a California Corporation; Does 1 through 100, inclusive,

Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION TWO

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an order of a trial court which closes a theater as a public nuisance pursuant to its Equity Powers, after a trial on the merits and as a penalty for a past, continuous, course of unlawful conduct, is a prior restraint which is prohibited by the United States Constitution?

2. Whether the Court of Appeal's decision which precludes all civil public nuisance abatement and equitable sanctions against the exhibition of obscene motion picture films except the remedy of a personal injunction against a specific film, has deprived the plaintiff, as the authorized law officer representing Santa Ana residents, of federal rights under the 9th, 10th and 14th Amendments to the U.S. Constitution; and whether this Court's decision

in Vance v. Universal Amusement Co., Inc., 455 U.S. 308, was intended to so limit the available state remedies?

2(a) Whether the trial court's order, which established a $100,000.00 trust fund as security for attorney's fees, costs and expenses incurred by the City in establishing public nuisances at the Mitchell Brothers' Santa Ana Theater in future obscenity public nuisance abatement lawsuits, constituted a prior restraint; and, if not, whether the Court of Appeal's holding that such remedy was not available to the City of Santa Ana and its residents under California law was a denial of equal protection of the law, in view of the fact that:

(1) the California Judiciary in Serrano v. Priest, 20 Cal.3d 25 at 46, pursuant to an exercise of

its equity powers, has authorized the payment of attorney's fees in other similar cases where "rights created or protected by the State Constitution are protected to the benefit of a large number of people" and where the "nature of the litigation was such that subsidization of the plaintiff is justified in the event of their victory"; under the private attorney-general principle; and

(2) the California Legislature in C.C.P. section 1021.5 has enlarged the Serrano ruling to include cases beyond those vindicating constitutionally based rights, and has authorized the payment of attorney's fees to others in cases involving environmental protection, Woodland Hills Residents Assn., Inc. v. City

Council of Los Angeles, 23 Cal.3d 917 at 925, 936, but has excluded such payment to "public entities" such as the City of Santa Ana which, has had occasion to appear as a plaintiff and file public nuisance abatement lawsuits to protect the moral environment of the City?

2(b) Whether it is a denial of due process of law and equal protection of the law to deny the residents of the City of Santa Ana reimbursement for damages (damages to the moral environment and costs of abatement) when it is the prevailing party in a public nuisance abatement lawsuit, in view of the fact that, under this Court's decision in Owens v. City of Independence, Mo., 445 U.S. 622, the City of Santa Ana no longer is immune

from financial liability in such cases and the City (and its residents as taxpayers) would be absolutely liable for damages and attorney's fees under 42 U.S.C. §1983 and 42 U.S.C. section 1988, and would be subject to liability for attorney's fees under California Code of Civil Procedure section 1021.5, had it not prevailed against the Santa Ana Mitchell Brothers' Theater?

2(c) Whether, in view of Serrano v. Priest, supra, and California Code of Civil Procedure section 1021.5, the trial court's refusal to exercise its equity powers and award attorney's fees to the City Attorney, acting for and on behalf of the residents of Santa Ana in the underlying public nuisance abatement lawsuit, was an abuse of discretion and a denial of due process of law and equal protection of the laws?

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I

TRIAL JUDGE WEEKS' CONCLUSION OF LAW XVI THAT, AS AN EQUITY JUDGE HE WOULD HAVE CLOSED THE MITCHELL BROTHERS' SANTA ANA THEATER AS A PUBLIC NUISANCE EXCEPT FOR THE FACT THAT THE FEDERAL CONSTITUTION PREVENTED "CLOSURE", WAS BASED UPON AN ERRONEOUS PREMISE. A TRIAL COURT HAS THE EQUITABLE POWER, AFTER A TRIAL ON THE MERITS, TO CLOSE A THEATER WHICH PRESENTLY CONSTITUTES A PUBLIC NUISANCE, AS A PENALTY FOR A PAST CONTINUOUS COURSE OF UNLAWFUL CONDUCT. SUCH AN ORDER DOES NOT CONSTITUTE AN UNLAWFUL PRIOR RESTRAINT UNDER THE FEDERAL CONSTITUTION. 45

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In the
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October Term, 1982

EDWARD COOPER, CITY ATTORNEY OF SANTA ANA, CALIFORNIA,

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vs.

MITCHELL BROTHERS' SANTA ANA THEATER, located at 1565 West 17th Street, Santa Ana, County of Orange, California; M.B.F.G. THEATER CIRCUIT, INC.; JIM GISH; ALLISON HONER CO., a partnership; UNITED ARTISTS THEATER CIRCUIT, INC.; CONTINENTAL AUXILIARY COMPANY, a California Corporation; BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a National Banking Association; JAMES MITCHELL; ARTIE MITCHELL; DEMICH, INC., a California Corporation; MITCHELL BROTHERS FILM GROUP, a General Partnership; CINEMA 7, INC., a California Corporation; Does 1 through 100, inclusive,

Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION TWO

PETITION FOR WRIT OF CERTIORARI

The petitioner respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the California Court of Appeal, filed on February 18, 1982, following the reversal and remand of its original judgment pursuant to this Court's deci-

sion in Edward Cooper, City Attorney of Santa Ana v. Mitchell Brothers' Santa Ana Theater, ___ U.S. ___, 70 L.Ed.2d 262, 102 S.Ct. ___ (Nov. 30, 1981).

OPINIONS BELOW

The opinion of the Court of Appeal, Fourth Appellate District, Division 2 (following remand from this Court), is reported in 128 Cal.App.3d 937, 180 Cal.Rptr. 728. A copy of the first opinion of the Court of Appeal, filed on Jan. 20, 1981, appears at Appendix A-1 to A-36 to this petition. A copy of the second opinion of the Court of Appeal (following remand), filed on Feb. 18, 1982, appears at Appendix A-37 to A-44 to this petition. A copy of the opinion of the Trial Court, filed June 6, 1978, appears at Appendix B-1 to B-161 to this petition. A copy of the Findings of Fact and Conclusions of law of the trial judge, filed June 6, 1978, appears at Appendix C-1 to C-33. A copy of the "Judgment After Trial By Court",

filed on June 6, 1978, appears at Appendix C-35 to C-45.

JURISDICTION

The opinion of the Court of Appeal (following remand from this Court) was filed on February 18, 1982. A timely petition for hearing in the California Supreme Court was filed on March 29, 1982. The California Supreme Court denied the petition on May 27, 1982. On June 3, 1982, the Court of Appeal filed its remittitur. This petition for certiorari was filed within 90 days from the date the judgment became final. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3) and Rules 17(b) and 17(c) of the U.S. Supreme Court.

STATUTORY PROVISIONS INVOLVED

The text of the following statutes and constitutional provisions is set forth at Appendix F-1 to F-21 to this petition: California Civil Code sections 5, 22.5, 3366-3369, 3479-3484, 3490-3495, 3523; California

Government Code sections 38771, 38773 and 38773.5; California Code of Civil Procedure sections 731, 1021 and 1021.5; California Penal Code sections 311, 311.2, 370, 371, 372 and 373a; First, Ninth, Tenth and Fourteenth Amendments to the U.S. Constitution.

STATEMENT OF THE CASE

This case was before this Court during the 1981 October Term in Case No. 81-271 on a Petition for Writ of Certiorari which presented three federal questions. Question 1 presented the federal issue as to whether a court order closing a theater, after trial, for past unlawful conduct was a prior restraint; Question 2, the issue of burden of proof; and Question 3, the issue as to whether, in limiting the public nuisance abatement remedy to a personal injunction against a specific film, the Court of Appeal's Judgment had deprived the City of Santa Ana and its residents of federal rights. In a per curiam opinion in Edward

Cooper, City Attorney of Santa Ana, California v. Mitchell Brothers' Santa Ana Theater, et al., ___ U.S. ___, 70 L.Ed.2d 262, 102 S.Ct. ___ (Nov. 30, 1981), this Court summarily reversed the Court of Appeal's judgment on the "burden of proof" issue, but denied the Petition as to Question 1 and 3. The petition herein presents the same federal questions which were presented in Questions 1 and 3 of the first petition but under different circumstances and in a more refined context, as is explained hereinafter in "Reasons For Granting The Writ", at pages 37-45.

STATEMENT OF FACTS

The following short titles are used hereinafter: "R.T." for Reporter's Transcript; "C.T." for Clerk's Transcript; "C/A.O.B." for Cross-Appellant's Opening Brief in the Court of Appeal.

On June 16, 1975, James Gish, the theater manager of the Mitchell Brothers' Four Star Theater [1] on Wilshire Blvd in Los Angeles, submitted an application to the City of Santa Ana, on behalf of M.B.F.G. Theater Circuit, a division of Cinema 7 Inc., for a business license to operate the Mitchell Brothers' Santa Ana Theater at 1565 West 17th Street, Santa Ana, California (R.T. 987 line 9-988 line 6). On July 14, 1975, United Artist Theater Circuit Inc., executed a 5 year lease of the premises at 1565 West 17th Street to M.B.F.G. Theater Circuit and, by addendum to the lease, dated August 1, 1975, executed by the defendants, James Mitchell and Artie Mitchell, Cinema 7, Inc., became the leasee in place of M.B.F.G. Theater Circuit, (R.T. 1003 line 12-1004 line 11).

1/ The efforts of the City of Los Angeles to halt the operations of the Mitchell Brothers Four Star Theater under the Red Light Abatement Law (Penal Code, sections 11225-11235), for acts committed during 1974, are chronicled in People v. James Mitchell et al., 64 Cal.App.3d 335, 134 Cal.Rptr. 358 (November 30, 1976).

On September 3, 1975, the Mitchell Brothers' Santa Ana Theater commenced its operations under the business license issued by the City and the first program offered a triple feature: "Sodom and Gomorrah", "Behind the Green Door", and "Resurrection of Eve" (R.T. 946 line 9-15; 1049 line 22-1050 line 5), all three of which were produced, directed, and photographed by James Mitchell and Artie Mitchell, and distributed and exhibited by them in their finished form at their own chain of theaters,[2/] acquired by them during the period 1973-1975, and operated as a theater chain under the name, "M.B.F.G. Theater Circuit". (Plaintiff's Exhibit No. 90, R.T. 1045 line 6-11). At the time they commenced their Santa Ana operations, they openly advertised their theaters in Northern California as "Mitchell

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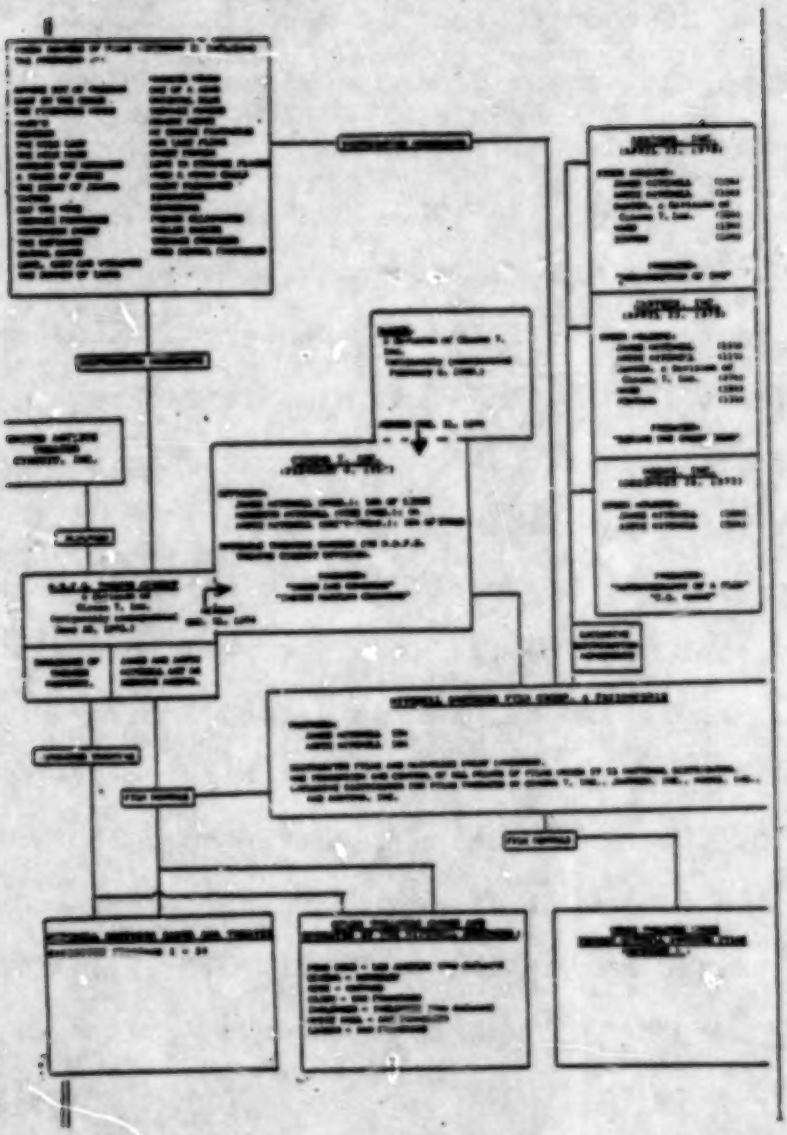
2/ Photo-reduced copies of the time and motion studies of the six films produced by the Mitchell Brothers and involved in this and in the three copyright cases Clancy, et al. v. Jartech, Inc., et al., Nos. 81-2094, 81-2095 and 81-2096 appear hereinafter at Appendix D-1 thru D-185.

Brothers Porno Theaters" (R.T. 1051 line 26) and the films which they had produced, directed, and photographed as "hard-core" (R.T. 1055 line 6).

The history of the growth of the operations of James Mitchell and Artie Mitchell, from 1969, as producers and exhibitors of sexually oriented films at their O'Farrell Theater at 895 O'Farrell Street in San Francisco, to their operations in 1975, when they billed themselves as "the Cecil B. DeMille and David O. Selznick of modern porn" (R.T. 1045), is described in the trial testimony of James Mitchell, (C/A.O.B. at A-54 through A-84 and A-116 through A-137). An operational chart of the defendants' "pandering" businesses (Plaintiff's No. 77) appearing on the opposite page, was prepared from the testimony of James Mitchell.

The Mitchell Brothers' Santa Ana Theater was located in the Honer Plaza Shopping area, and adjacent to the First Christian Church, Orange County Social Service Dept.,



Bank of America, Ralphs Market, Sav-On Drug-store, Montgomery Ward, Imperial Bank, and across the street from the Santa Ana Community Junior College (R.T. 711-713). The triple feature ran continuously from 11:00 A.M. TO 11:00 P.M., seven days a week, from September 3, 1975 through January 15, 1976 (R.T. 671). During that time it became a matter of public discussion on the agenda of the City Council (R.T. 1207).

In November of 1975, City Attorney Keith Gow employed special legal counsel to assist him, and a special investigator, Robert McGuire, who paid the admission price of $5.00, began making regular photographic and sound surveillances of the programs being exhibited at the theater (R.T. 370-377). The special counsel was then employed by the City of Duarte in a motion picture theater public nuisance abatement case involving Duarte City Ordinance 369, which was subsequently approved as a procedural ordinance in People ex rel. Camil, City Attorney of Duarte v. Buena

Vista Cinema, 57 Cal.App.3d 497, 503, (1976).

Thereafter, public hearings were held and, on January 19, 1976, the City Council duly enacted Ordinance NS-1287 (R.T. 607 line 21-608 line 12) which was patterned after City of Duarte Ordinance 369, and also approved an "Agreement for Legal Services" for special counsel to assist City Attorney Keith Gow "in connection with litigation to abate conditions within the City, determined by the Council under the provisions of Ordinance No. NS-1287 to be public nuisance." (R.T. 1129). On Jan. 15th, the defendants stopped exhibiting their triple feature (which had run for 4 months) and commenced exhibiting other pornographic films.

On October 4, 1977, a unanimous Santa Ana City Council (R.T. 1212) duly enacted (R.T. 608 line 13-206 line 5) NS 1325 as an emergency ordinance to amend NS-1287 to apply a correction "required by the decision of the Court of Appeal in People ex rel. Camil v. Buena Vista Cinema" (See section

7 at R.T. 1212). Under the amendment, the City Council "upon a specific finding that a public nuisance" existed under the abatement ordinance, was required: "to order the revocation of all licenses and permits which have been issued as a part of the operation of such business, subject to confirmation by the Court in the judicial proceedings required herein. Criminal proceedings for transacting business without a license at such address shall not be filed until the order of license revocation by the City Council has been confirmed by judicial order."

On June 1, 1976, the California Supreme Court rendered its decision in People ex rel. Busch v. Projection Room Theater et al., 17 Cal.3d 42, 130 Cal.Rptr. 328 (June 1, 1976) upholding the application of Civil Code section 3479 and 3480 (the general public nuisance statute) to motion picture theaters engaged in the business of exhibiting obscene films, and on November 1, 1976, this Court denied a petition for a writ of

certiorari in that case, Van de Kamp, as District Attorney v. Projection Room Theater et al., 428 U.S. 922.

Plaintiff's Complaint in Equity for an Injunction and To Abate a Public Nuisance was filed on Nov. 2, 1976, pursuant to Civil Procedure Code Section 731. (C.T. 2) The complaint alleged, in part, that commencing on or about Nov. 28, 1975, and repeatedly and continuously thereafter, up to and including the date of filing of the Complaint, the defendants exhibited at the Mitchell Brothers' Santa Ana Theater, 30 obscene motion picture films in 15 successive programs, identifying the films by name and the dates on or about which they were exhibited; that on Oct. 26, 1976, the City Council had acted by Resolution to revoke the theater's license and to declare the place a public nuisance and in violation of Ordinance NS 1325 and ordered the City Attorney to commence legal proceedings to abate the same by law and to obtain confirmation of the

revocation of license based upon the existence of a public nuisance; that unless restrained, the defendants would continue to show the same and other such obscene films in the future. As a part of the prayer, plaintiff asked for a preliminary and final injunction and asked the Court to fix a time and place for a hearing on a preliminary injunction. (C.T. 2-28.)

At the time of filing, plaintiff noticed a motion for a hearing on a preliminary injunction. On December 1, 1976, plaintiff noticed a motion to advance the hearing on the final injunction and to consolidate the same with the hearing on the application for a preliminary injunction, in anticipation that the defendants would object that plaintiff was not entitled to any relief on a motion for a preliminary injunction. (C.T. 51-52.)

On January 12, 1977, the Court granted plaintiff's motion to consolidate the hear-

ings on the preliminary and final injunction. (C.T. 132.)

On June 6, 1977, the Court granted the plaintiff's motion to file an amended complaint. In its "First Amended And Supplemental Complaint In Equity For An Injunction And To Abate A Public Nuisance", plaintiff identified the names of the films shown from and after the filing of the complaint up to April 1, 1977, the cut-off date previously established by the Court for films which would be included as a part of the subject matter of this action (R.T. for Jan. 28, 1977, at pg. 5, line 6) (C.T. 217-218) and amended the prayer to add the words and phrases "including compensatory damages and punitive damages in an amount to be determined by this Court for the willful, intentional, oppressive and malicious conduct of such defendants" after the words and phrases "and further relief as the Court may deem proper". (C.T. 224.)

The trial began on October 11, 1977, and on October 17, 1977, the trial court determined that the pleadings set up mixed issues of law and equity, and that the case should proceed to a jury trial on the issues of "obscenity", "public nuisance", and "damages", as a matter of right, prior to the trial court's resolution of the equitable issues. (C.T. 328) (C/A.O.B. A-14 thru A-15). On October 25, 1977, the trial judge ordered the jury trial to be <u>further</u> bifurcated, to proceed first on the issue of "obscenity" and "public nuisance", to be followed thereafter on the issue of damages, if necessary to do so. (C.T. 352) (C/A.O.B. A-25).

The "liability" phase of the jury trial began on October 17, 1977, and ended on December 7, 1977. During that period the jury viewed 17 of the 41 feature length films alleged to be obscene (R.T. 727, et. seq.) (C/A.O.B. A-34 thru A-41), and

considered real and testimonial evidence on the scope of the defendants James Mitchell and Artie Mitchell's motion picture operations during the period 1969-1977. (R.T. 843 et seq.). The Court first admitted, (R.T. 604) (C/A.O.B. A-22), then excluded real and testimonial evidence on the remaining 24 films. (C.T. 375-376) (C/A.O.B. A-41). Both James Mitchell and Artie Mitchell were called as witnesses by the plaintiff under C.C.P. section 776 (C/A.O.B. A-54 through A-72; A-77 through A-84; A-117 through A-137; A-142 through A-144) and pursuant to a court order and a subpoena duces tecum. By verdicts rendered on December 6, and 7, 1977, the jury found 11 of the 17 films to be "obscene" under a "beyond a reasonable doubt" burden of proof, and 4 of the 17 films "not obscene" under a "beyond a reasonable doubt" burden of proof, and was unable to reach a verdict on two films. They also returned a public nuisance verdict for the period that the 11 films were shown, under

a "preponderance of the evidence" burden of proof.

The "damages" phase of the trial commenced before the same jury on December 12, 1977 and ended on January 5, 1978. On January 5, 1977, the jury returned its verdicts in the amount of $76,400.00 compensatory damages. No punitive damages were awarded. (R.T. for Jan. 5th at 93). (C/A.O.B. A-289).

On January 5, 1978 the equitable issues stood submitted.

A "Judgment on Verdicts In Open Court" was filed on Jan. 6, 1978 (C.T. 470).

On June 6, 1978, the Court entered its "Findings of Fact and Conclusions of Law", "Judgment After Trial By Court", and "Amended Memorandum of Opinion on the Issues of: (1) Constructive Trust, (2) Revocation of Defendants' Business License, (3) Closure of Defendants' Theatre." (C.T. 1134-1220). In its judgment, the trial court denied the plaintiff's prayer to impose a constructive trust on the defendants' box office receipts,

denied the plaintiff's prayer to approve the action the City Council in Resolution 76-134 which revoked the defendants' licenses and permits, and granted the injunction, permanently enjoining the 11 motion picture films.

The Court, in the exercise of its independent judgment, found the 11 films to be obscene beyond a reasonable doubt and rejected the defendants' proposed counter - findings that four films were not obscene. (R.T. for May 2, 1978 at 5) (C/A.O.B. A-304). The Court also ordered the destruction of the 11 prints that were found obscene. (R.T. for May 2 at 44) (C/A.O.B. A-311). Although the plaintiff's motion to close the theater for one year was denied, on the ground that it was constitutionally impermissible,[3/] the

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3/ See Conclusion of Law XVI, infra, at pages C-29 and C-30 which reads:

> "Under the facts in this case; namely, that the Defendants are engaged in the commercial exploitation of obscene motion picture films and have for a substantial period of time in the past and as a continuing and regular
> (FOOTNOTE CONTINUED ON NEXT PAGE)

Court ordered the defendants to allow the City's officers "free and total access to all parts of the theater" for a two-year period for monitor purposes and ordered the deposit of a cash bond of $100,000.00 in trust[4/] for

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course of conduct exhibited sexually explicit films depicting oral copulation, sodomy, masturbation, homosexuality, lesbianism,group sex, portrayed incest, portrayed rape, the licking of sperm from the bodies of the actors and smearing of sperm on the face, and have admitted their intention to continue to show the same similarly sexually explicit films in the future, the abatement remedy of closing the defendants' theater for a period of time would otherwise constitute a proper and suitable equitable remedy except for the law expressed in People ex rel. Busch v. Projection Room Theater (1976), 17 Cal.3d 42, 58 that such closure is prohibited by the Constitution of the United States as a prior restraint."

4/ As to the reasonableness of the amount of the bond, the Court noted (R.T. for May 2, 1978 at 57A) (C/A.O.B. A-313):

THE COURT: All right. That will be noted, but I might say, while not used as supportive of this conclusion, it is a fact, . . . Artie Mitchell in response to this provision says, and I'll show you the newspaper article, . . . "it was no problem", that they "netted . . . close to . . . $400,000.00 during this period of time up at the theater, so that the hundred thousand dollars was no problem"; so that, is simply in response to your claim that you have to have a hundred thousand dollars. But as far as your constitutional argument, I don't see any real

the City of Santa Ana at the United California Bank in Santa Ana as a security deposit against future attorney fees, costs and expenses incurred by the City of Santa Ana in connection with any future public nuisance action filed subsequent to July 1, 1978, and required that said cash bond be maintained for two years.[5/] The Court denied the plaintiff's motion for an award of costs of abatement in the amount of $71,420.22 but allowed the City the recovery of $5869.31 in costs (R.T. for May 2, 1978 at 65 et seq.) (C/A.O.B. A-313).

Both parties appealed to the Court of Appeal, Fourth Appellate District. The defendants appealed and the City both appealed

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constitutional infringement there because it doesn't create any type of prior restraint whatsoever on you, and certainly there is no proposition of law that there can't be some burdens and some detriment involved in the exercise of First Amendment Rights."

5/ The equitable relief which was granted as an alternative to "closure" was predicated upon the trial judge's interpretation of this Court's previous rulings in obscenity public nuisance abatement litigation. See the opinion of Trial Judge Weeks, infra, at page B-61.

and cross-appealed from the "Judgment on Verdicts in Open Court." The defendants appealed and the City cross-appealed from those portions of the "Judgment After Trial By Court" which were adverse to the respective parties.[6/]

In its opinion filed on Jan. 20, 1981,[7/] the Court of Appeal reversed the "Judgment on Verdicts In Open Court" in its entirety (See opinion at A-35 - A-36) but refused to rule upon any of the errors which Plaintiff

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6/ In its appeal, the City raised the following federal questions:

> ". . . Whether the burden of proof on the equitable trial (injunction) should have been 'clear and convincing evidence' instead of beyond a reasonable doubt?" (C/A.O.B. 21).
>
> "Whether the trial court erred in its judgment in the third phase of the trial (Re: injunction) which refused to grant the remedy of abatement of the public nuisance by closure, and held that although, under the facts in this case, the abatement remedy of closure of the defendants' theater for a period of time would otherwise constitute a proper and suitable equitable remedy, such was barred by the law expressed in the Busch case that 'closure' is prohibited by the federal constitution as a prior restraint?" (C/A.O.B. 24 lines 9-13).

7/ A copy of the opinion appears herein at Appendix A-1 through A-36.

claimed had occurred during the jury trial phase and addressed itself only to the questions which were raised in relation to the "Equity" phase. The Court stated that injunctive relief against those movies found to be obscene was the only remedy which was permitted under this Court's decision in Vance v. Universal Amusement Co., Inc., 445 U.S. 308.

In its opinion dealing with the "Equity" phase of the trial, the Court affirmed those portions of the "Judgment After Trial By Court" which enjoined the defendants from advertising or exhibiting the eleven (11) films found by the trial court to be obscene beyond a reasonable doubt. The Court also upheld the trial judge's rulings which denied the City's requests for a constructive trust on the defendants' box office receipts, a revocation of the defendants' license, and the closure of defendants' theater for one year, but reversed those parts of the "Judgment After Trial By Court" which ordered access for the City's officers to all parts of

the defendants' theater for two years, the payment by the defendants of $100,000 into a trust fund for the City's future attorney fees, and the destruction of the prints of the eleven (11) films declared obscene, holding that injunctive relief was the only remedy which was permitted under this Court's decision in Vance v. Universal Amusement Co., Inc., 445 U.S. 308. The Court also held that "closure" of the theater "would result in a full and pervasive prior restraint upon the freedom of speech and of the press in violation of the First and Fourteenth Amendments to the United States Constitution" and that under this Court's decision Vance v. Universal Amusement Co., Inc., supra, the burden of proof in a civil public nuisance abatement action against films must be "beyond a reasonable doubt" and not "preponderance of the evidence."

On March 2, 1981 Plaintiff filed a Petition for Hearing in the California Supreme

Court[8/] which was denied on May 13, 1981.

Petitioner filed its first Petition for Writ of Certiorari on August 10, 1981. On November 30, 1981, this Court granted the same in Edward Cooper, City Attorney of Santa Ana v. Mitchell Brothers' Santa Ana Theater, et al., No. 81-271, as to Question 2 (burden of proof), but denied the petition on Questions 1 and 3.

Upon remand to the Court of Appeal, Petitioner argued in its Plaintiff/Appellant's Supplementary Brief, filed on January

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8/ In its petition the City raised the same two federal questions which were raised in the Court of Appeal, (see pg. 22 at fn. 6) and the following additional federal question regarding the Court of Appeal decision:

> " Whether the decision of the Court of Appeal, by depriving the plaintiff, acting in his representative capacity as the authorized law officer of the City of Santa Ana, of all civil public nuisance abatement and equitable remedies except a personal injunction which can only be obtained: (1) after the exhibition of each obscene film and lengthy litigation; and (2) at great financial risk to the City and its officers and employees; and (3) at great costs of abatement to the City; and (4) without reimbursement from the person maintaining and profiting by such public nuisance, has deprived the plaintiff of a constitutionally adequate judicial remedy?"

4, 1982, that this Court's note of jurisdiction on January 11, 1982 on the closure issue in U.S. Marketing, Inc., et al. v. State of Idaho, No. 81-741 had reestablished "closure" as a litigable issue and that the Court should reexamine the entire appeal, in greater depth, including the "remedy" issues as to closure (Point I); the City Attorney's right to recover monetary damages in a civil action under C.C.P. section 731 (Point IV); the correctness of the trial court's order for the destruction of the 11 films as derivative contraband (Point V); and the right to a reasonable attorney's fee for the abatement of a public nuisance and as the prevailing party on appeal (Point VI). In its opinion (see Appendix A-37, et seq.), the Court of Appeal rejected the Petitioner's argument as to the scope of the appeal and ruled that only the Burden of Proof issue was before the Court, holding that both the First Amendment to the U.S. Consti-

tution and Article 1, section 2 of the California Constitution require that obscenity be proved by "clear and convincing evidence" in a civil public nuisance abatement action. The Court reiterated its earlier opinion on remedies in its entirety and remanded the case to the trial court to allow the City Attorney to seek the one equitable remedy that the Court of Appeal holds is available under the Federal Constitution and its interpretation of this Court's opinion in Vance v. Universal Amusement Co., Inc., supra, namely, an injunction as to the remaining six films.

On March 27, 1982, Petitioner filed a Second Petition for Hearing in the California Supreme Court which was denied on May 27, 1982, with Associate Justice Reynoso dissenting.

SUMMARY OF ARGUMENT

Santa Ana's experience with hard-core pornography at the Mitchell Brothers' Santa Ana Theater for the past 7 years, is a governmental problem which is facing all cities. The problem has escalated. The same pornographic movies are now on TV.

Confusion as to what remedies an Equity Court can apply after trial of a nuisance lawsuit is the result of this Court's not having squarely faced the problem since Huffman v. Pursue, Ltd. (1975) and Art Theater Guild, Inc. v. Ohio ex rel. Ewing.

Vance v. Universal Amusement Co., Inc. was mis-cited . It is inapposite on the issue of what remedies may be applied after a trial on the merits.

The conflict between the California and Idaho Supreme Courts on whether a theater can be closed as a nuisance makes this question ripe for consideration. Rule 17(b).

The question on "closure" is presented

in this petition under different circumstances, and the question of the inadequacy of the state remedy is presented in a narrower context than in the previous petition filed during the 1981 Term.

In considering whether the Petition presents "substantial federal questions", the Court should take judicial notice of other notorious facts relating to the Mitchell Brothers' operations.

I

It is clear that Judge Weeks would have closed the Mitchell Brothers Theater except for the California dictum in Busch that such was not possible under the United States Constitution. The Idaho Supreme Court opinion holding "closure" to be available after trial, as a penalty for a continuous course of past unlawful conduct is correctly reasoned and should be approved.

II

The single remedy allowed - that of a

personal injunction against a specific obscene film - is a worthless remedy. It violates the cardinal rule of law that for every legal wrong there is a legal remedy.

IIA

The reversal of that part of the trial court's order which provided security for future attorney's fees was arbitrary and denied Petitioner of the benefits under California Law which accrue to a prevailing party who acts as a private attorney-general in an "environmental protection" lawsuit.

Under Serrano v. Priest and C.C.P. §1021.5, an attorney's fee, bases upon the private attorney-general concept, is allowed in "environmental protection" cases and can be recovered from a private party defendant. The exclusion as to "public entities" cannot be applied where the City Attorney brings his lawsuit on behalf of the residents in a specific geographical location to protect the moral environment. The City Attorney

and residents are entitled to equal protection of the law and cannot rationally be excluded from the statute's benefits.

IIB

"Damages" are authorized in public nuisance lawsuits. Ruling case law permits the City Attorney to recover "damages" arising out of a "physical" nuisance. There is no distinction between a "physical" and a "moral" nuisance. A private party does not have "standing" to recover "damages" for a moral nuisance. If the City Attorney may not recover "damages", the "damages" will go unrecovered. The result is a taking of property without due process of law.

IIC

Discretion to award an attorney's fee in an "environmental protection" lawsuit is controlled by C.C.P. §1021.5. Petitioner's rights thereto as the prevailing party is not subject to the "public entities" exclusion.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

For 7 years (September, 1975 - August, 1982) the City of Santa Ana has been confronted with a major law enforcement problem in the area of public morals. In September of 1975, a commercial business which produced, distributed and exhibited hard-core pornographic motion picture films on a national scale took over the lease of a neighborhood theater across the street from the Santa Ana Junior College and began showing three hard-core pornographic films which the operators themselves had produced and advertised as "hard-core": "Sodom and Gomorrah", "Resurrection of Eve" and "Behind the Green Door". Since September of 1975, those theater operators have continuously and uninterruptedly, from 11:00 A.M. to 11:00 P.M. and for seven days a week, exhibited nothing but hard-core pornographic films, see Appendix D-1 thru D-185 to this petition.

Remembering the commands of this Court against "prior restraint", expressed in Freedman v. Maryland, 380 U.S. 51, (1965); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, (1975) and a host of other federal decisions, and acting pursuant to the authority of an ancient common law principle which has heretofore been regarded as "sound" in the area of public nuisance law, and recently reaffirmed in People of the State of California ex rel. Busch v. Projection Room Theater, et al., 17 Cal.3d 42, the Santa Ana City Council decided to proceed under the civil law and the basic authorization of the California public nuisance statute and Santa Ana's special public nuisance ordinance.

The Santa Ana experience during the past 7 years is a microcosm of a governmental problem which is perplexing other City Councils and City Attorneys throughout this nation. That problem - the intrusion of

hard-core pornography into the lifestyle of the national community - is not an even which can be brushed under the rug. As noted by Judge Weeks in his opinion (see Appendix at B-45), the defendant James Mitchell testified that he expected to see films like "Behind the Green Door", found by the jury herein to be obscene, to be appearing on television within the near future. That expectation has already borne fruit.

The present uncertainty in public nuisance law, exemplified in the conflict between the rulings of Trial Judge Weeks and the Court of Appeal below, is the result of this Court's not having squarely faced the obscenity nuisance abatement problem since its decisions during the 1974 October Term in Huffman v. Pursue, Ltd., 420 U.S. 592, (1975), and Art Theater Guild, Inc., et al. v. Ewing, 421 U.S. 923, (1975), appeal dismissed for want of a substantial federal question. Unless this Court settles the

substantial federal questions which are raised in the petition herein, such uncertainty will continue, and the City's ability to resolve its public nuisance abatement problem will be seriously impaired.

The Court of Appeal erred when it held Vance v. Universal Amusement Co,, Inc., 455 U.S. 308, (1978) to be apposite and overruled the remedies which had been applied by Trial Judge Weeks after a trial on the merits. The Vance decision decided only the narrow question as to the judicial authority of Texas Courts under the Texas Statutes to grant a preliminary injunction "of indefinite duration on the exhibition of motion pictures prior to a trial on the merits." (Our emphasis.) There was no preliminary injunction issued in the Santa Ana case. At the beginning of the lawsuit, the hearing on the preliminary injunction was consolidated with the hearing on the final injunction (see Statement of Facts, supra, at page 14),

and the trial was thereafter had on the merits. At the conclusion of the trial, plaintiff requested that the premises be closed under the Santa Ana Ordinance (see pp. B-99 thru B-100), based on the notorious nature of the defendants' unlawful past conduct, which had been spread upon the trial record..

Petitioner submits that the recent unanimous decision of the Idaho Supreme Court in Idaho ex rel. Wayne Kidwell v. U.S. Marketing, Inc., ___ Idaho ___, 631 P.2d 622, which holds, contrary to the ruling of Trial Judge Weeks herein and the California Supreme Court in People ex rel. Busch v. Projection Room Theater, et al., 17 Cal.3d 42, that closure of a theater after a trial on the merits "does not by itself constitute an unlawful prior restraint upon the exercise of free speech", makes this a federal question which is ripe for consideration in this petition for certiorari. See Rule

17(b) of the U.S. Supreme Court.

A. The Differing Circumstances In This Second Petition For Writ Of Certiorari Regarding The Federal "Closure" Issue.

The differing circumstances in this second petition are as follows: Six weeks after this Court's decision in the Cooper case, supra, at page 25, the "closure" issue presented in Question 1 was again presented to this Court in a Jurisdictional Statement in an appeal from a decision of the Idaho Supreme Court which rejected the First Amendment claim and upheld the right of a trial court to impose "closure" after a trial on the merits as a penalty for past unlawful conduct, U.S. Marketing, Inc., et al. v. Idaho, et al., ___ Idaho ___, 631 P.2d 622. At that time, this Court noted jurisdiction in U.S. Marketing, Inc., et al. v. Idaho, et al., No. 81-741, ___ U.S. ___, 71 L.Ed.2d 291, ___ S.Ct. ___ (Jan. 11, 1982), but was prevented from deciding the

federal "closure" issue when U.S. Marketing, Inc. dismissed its appeal under Rule 53, subsequent to this Court's note of jurisdiction and before this Court had an opportunity to hear arguments on that issue. See U.S. Marketing, Inc., et al. v. Idaho, et al., No. 81-74[illegible], ___ U.S. ___, 71 L.Ed.2d 878, ___ S.Ct. ___ (Mar. 10, 1982).

While the procedural aspect in which the "closure" issue is being presented in this case differs, in that such is being raised by the City Attorney on behalf of the residents of Santa Ana in a Petition for Writ of Certiorari, whereas in the U.S. Marketing, Inc., case, supra, that issue was raised by the distributors of obscene matter in a jurisdictional statement pursuant to an appeal, the substantial nature of the federal question is not diminished. Petitioner submits that, in as much as the trial facts and the "closure" issue presented a "substantial federal question" under this

Court's note of jurisdiction in the Idaho case on January 11, 1982 (see Supreme Court Rules 15.1(h) and 16.1(c)), then, a fortiori, a substantial federal question has been raised by the Statement of Facts herein, which show: [9/] (1) that the residents of the City of Santa Ana, California are attempting to preserve the moral environment of that City by ousting the Mitchell Brothers' Santa Ana Theater which, except for a three month period from January to March, 1979, has shown nothing but hard-core pornography for the past seven years (Sept. 1975 thru August 1982); and (2) the trial judge has ruled that, under the trial facts, he would exer-

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9/ The City of Santa Ana and the Mitchell Brothers are also before this Court in three Petitions for Writs of Certiorari in Clancy, et al. v. Jartech, Inc., et al., Case Nos. 81-2094, 81-2095 and 81-2096, involving a federal copyright infringement trial brought by the Mitchell Brothers and federal questions as to whether obscene matter can be issued a copyright under federal law and whether the copying by the City was "fair use" as a matter of law. Petitioner requests this Court to take judicial notice of the subject matter in those Petitions, in determining whether the "Questions Presented" in the Petition for Writ of Certiorari herein are worthy of plenary review.

cise his Equity Powers and close the theater if such were permissible under the federal constitution (see Conclusion of Law XVI at pages C-29 and C-30).

On the issue as to whether this Petition presents a "substantial federal question", Petitioner requests this Court to take judicial notice of two newspaper items which appeared in the New York Times on July 1, 1973 and in the San Francisco Chronicle on July 16, 1973, copies of which appear herein at Appendix G-1 thru G-4. Those articles reported on the comments of James and Artie Mitchell following this Court's decision in Miller v. California, 413 U.S. 15 and its companion cases, as follows:

NEW YORK TIMES, July 1, 1973:

" SAN FRANCISCO, June 30-- In the major pornography producing centers of Los Angeles and San Francisco, the Supreme Court's latest ruling on obscenity was met this week with concern and anger but also with the promise that the business was not dead.

In San Francisco, James Mitchell, who along with his brother Artie has emerged as one of the most successful

pornographic-film makers in the nation, called the Court's ruling on June 21 'totally insane.'

But while he was critical of the decision, he said that he would not be forced out of business. 'They'll have to put us in jail,' he said. 'We're prepared to go down fighting.'

. . . . .

In Los Angeles, another film maker, Russ Meyer, said that he believed the effect of the ruling would be devastating. 'You can't jeopardize investors' money,' he said, explaining that it was not now known when a film was made where it could be shown.

But James Mitchell, who is 29 years old, took another view. 'The young Turks don't give a damn,' he said. 'They'll keep on making movies. They don't know any better. After all, we're only in it to have a good time and make money.'"

SAN FRANCISCO CHRONICLE, July 16, 1973:

" Artie Mitchell and his brother Jim, both in their 20's, head the Mitchell Brothers Film group, a five-year-old concern that began with 15-minute films of nude, gyrating women and is now enjoying the profits of 'Behind the Green Door' starring Marilyn Chambers, the noted former Ivory Snow model.

'We are not going to change anything, not one whit, unless someone comes in here and actually drags us off to jail,' he says.

He said he plans to go ahead with distribution of another film starring Miss Chambers, 'The Resurrection of Eve,' and will begin work soon on 'our first hardcore political satire.'

ELSEWHERE

He wouldn't give many details, but he said the next venture will involve 'characterizations' of President Nixon and Supreme Court Chief Justice Warren Burger."

Petitioner also requests this Court to take Judicial Notice of the transcript of the testimony of the City's surveillance operator in the second and third Santa Ana public nuisance abatement lawsuits, a copy of which appears at Appendix M-1 thru M-17 in the Petition for Writ of Certiorari in No. 81-271, and the testimony of the surveillance operator re the "sameness" in the nature of the films shown during the seven year period (at Appendix M-5). See, also, Appendix "G" to Application A-1071, filed with this Court during the 1981 October Term, being pages 45-52 of the deposition of James Mitchell which was stipulated into evidence as Exhibit 3 in the pending trial of the second and third public nuisance abatement lawsuits. In his deposition,

James Mitchell admitted that the defendants specialize in hardcore films and, except for a three month period when they showed only "soft core" pornography, have show nothing but hard-core pornography at the Santa Ana Theater for the entire period of 1975-1981 (5 years). The surveillances undertaken by the City of Santa Ana during that seven year period have involved approximately 364 programs (52 weeks for 7 years) and 500 films (2 films per program). A list of the hard-core pornographic films which have been produced and surveilled during that period appears herein at Appendix H-1 thru H-27. As a result of this Court's inaction, those films are now appearing on T.V.

B. <u>The Refinement In This Second Petition For Writ Of Certiorari Presented By Subsidiary Questions 2A, 2B and 2C On The Broad Question As To Whether By Limiting Santa Ana's Remedy To A Personal Injunction Against A Specific Film, The Court Of Appeal's Judgment Has Deprived The Petitioner Of Federal Rights</u>.

The broad general question which was

posed in Question 3 of the first petition appears as Question 2 in this second petition for writ of certiorari and has been refined by framing additional subsidiary questions 2A, 2B and 2C as questions which are fairly included within the principle question.

The trial court's judgment, dated June 6, 1978 (see Appendix C-41, et seq.), continued the trial court's jurisdiction over the theater for two years, and awarded the Petitioners the right to attorney's fees, costs and expenses incurred by the City in the future, where it was the prevailing party in public nuisance abatement lawsuits against the Mitchell Brothers' Santa Ana Theater filed subsequent to July 1, 1978. The Court of Appeal's decision reversed the trial court's award of attorney's fees in future cases, and deprived Petitioner of that attorney's fee remedy under its interpretation of this Court's decision in Vance

v. Universal Amusement Co, Inc., 455 U.S. 308. The California Court's refusal to recognize Santa Ana's right to an attorney's fee under the trial court's exercise of its Equity Powers presents an "equal protection" conflict with the California Supreme Court's decision in Serrano v. Priest, 20 Cal.3d 25 at 46, and the California Legislature's enactment in Code of Civil Procedure section 1021.5 which enlarged upon the Serrano ruling. Zobel v. Williams, ___U.S.___72 L.Ed. 2d 672 at 677, 678 (June 14, 1982).

I

TRIAL JUDGE WEEK'S CONCLUSION OF LAW XVI THAT, AS AN EQUITY JUDGE HE WOULD HAVE CLOSED THE MITCHELL BROTHERS' SANTA ANA THEATER AS A PUBLIC NUISANCE EXCEPT FOR THE FACT THAT THE FEDERAL CONSTITUTION PREVENTED "CLOSURE", WAS BASED UPON AN ERRONEOUS PREMISE. A TRIAL COURT HAS THE EQUITABLE POWER, AFTER A TRIAL ON THE MERITS, TO CLOSE A THEATER WHICH PRESENTLY CONSTITUTES A PUBLIC NUISANCE, AS A PENALTY FOR A PAST CONTINUOUS COURSE OF UNLAWFUL CONDUCT. SUCH AN ORDER DOES NOT CONSTITUTE AN UNLAWFUL PRIOR RESTRAINT UNDER THE FEDERAL CONSTITUTION.

Trial Judge Marvin Weeks' ruling on closure in Conclusion of Law XVI (see foot-

note 3 on page 19, supra) was drawn from a background of sordid facts (See Findings of Fact XVI, XVII, XVIII and XIX at Appendix C-16 thru C-19 herein). It is clear from Judge Weeks' opinion that he would have closed the theater as a public nuisance under Santa Ana Ordinance N.S. 1287, section 12-102 (see Appendix B-99 thru B-100) and People ex rel. Busch v. Projection Room Theater, 17 Cal.3d 42, upon the conclusion of the trial on the merits except for the fact he believed that, under the federal constitution, he had no power to do so under any set of circumstances. See Judge Weeks' opinion, filed June 6, 1978, at Appendix B-61 herein:

> "Basing its decision then on the Busch case, supra, and the host of authorities cited therein, this Court must reluctantly deny plaintiffs the ultimate relief sought; to-wit: Closure of defendants' theatre for one year, and turn to some other means of giving full recognition to the jury's determinations which this Court considers as the voice of the majority of the moral and decent citizens in the County of Orange, in addition to this Court's

> independent determinations based on the totality of all the evidence and circumstances herein."

See, also, the reporter's transcript for May 2, 1978, where Judge Weeks noted that his Conclusion of Law was intended as a statement of the law, not a criticism of the law, at page 54. line 5 through page 57, line 17, and in particular, page 56, line 25 through page 57. line 17, reading:

> "THE COURT: . . . As I see it, that if the Appellate Court disagrees with my Conclusion of Law as stated in Busch and the Constitution, then they may see fit to reverse my decision, you see, based on this enumerated set of circumstances, and that is the way I see it, and I think that the atmosphere of the community and the cases are such that the Court, whichever one it is, here or in San Francisco or in Washington D.C. should have the opportunity to know that this little guy, that is sitting down here by assignment from the Municipal Court recognized that he would have closed this theater, based on the law, if it were not for the Busch case and the Constitution and that's all that I wish to portray in this Conclusion. And so, while I accept your position that, because it is stated that way, that it is critical of the law, it is not intended to be. It is simply intended to be my opinion of a correct status of what the law is, and what the facts were in this partic-

ular case."

Actual harm to Plaintiff from the asserted constitutional error is clear (see Finding of Fact No. XIX at Appendix C-18). Had the theater been closed, the City of Santa Ana would not now be presented with the problem it still confronts, four years after the final judgment was entered in the lawsuit.

The roadblock which Trial Judge Weeks faced was the dictum in People ex rel Busch, et al. v. Projection Room Theater, et al., 17 Cal.3d 42, 58, 130 Cal.Rptr. 328, 337 that "to grant the relief sought by plaintiffs (i.e., closing down the premises in question) would result in a full and pervasive prior restraint upon the freedom of speech and of the press in violation of the First and Fourteenth Amendments to the United States Constitution." That this language of the majority opinion in Busch was merely dictum, is established from an examination

of the concurring and dissenting opinion of Associate Justice Clark at page 62 reading:

> "I concur in the judgment and the opinion of the court except insofar as the new opinion differs from the vacated opinion by substitution of the material at page 337 to page 338 of 130 Cal.Rptr., at page 600 to page 610 of 550 P.2d in place of the following paragraph: 'We express no opinion upon the further question whether the court may, in addition, either close the premises entirely or enjoin further "obscene" exhibitions regarding materials not yet adjudged obscene. Several cases suggest that such further forms of relief would be appropriate and constitutionally permissible. (Citation of cases.) Since the United States Supreme Court has not yet spoken on this difficult question, and since in this posture of the case the issue is not before us, we leave the question open for further consideration." (Our emphasis.)

The issue presented herein has not previously been before this Court. The question of closure was presented to the trial judge after a trial on the merits, in which the proof conclusively shows that obscene motion picture films were shown continuously and as a regular course of business, at which time the trial judge ruled that, were

he permitted to close the theater under the federal constitution, he would have done so. Petitioner submits that, on these facts, the law is as was stated by the Idaho Supreme Court in Idaho ex rel. Kidwell, supra, and for the reasons therein given:

> "We therefore conclude that, under the circumstances of this case, a one-year closure of forfeiture order does not by itself constitute an unlawful prior restraint upon the exercise of free speech. Our conclusion is based on the following: the extensive power of the state to impose a forfeiture on neutral and innocent property used in the commission of forbidden acts; the power of the state to impose sanctions of its choice upon those who disseminate unprotected obscenity; the fact that the forfeiture or closure order is not directed at any speech or publication, but is instead aimed at the real property apart from the content of expression contained therein; and the fact that the defendants remain free to disseminate any materials, except those already determined to be obscene, at any other location, subject of course to further penal actions by the state should the defendants again violate laws regulating obscenity. Again, our conclusion is premised on the fact that, as shown by the record below, the one-year closure would be imposed only after a judicial determination of obscenity made pursuant to constitutionally acceptable procedures."

II

THE COURT OF APPEAL'S JUDGMENT WHICH PRECLUDES ALL CIVIL PUBLIC NUISANCE ABATEMENT AND EQUITABLE SANCTIONS EXCEPT A PERSONAL INJUNCTION AGAINST A SPECIFIC FILM HAS DEPRIVED THE PLAINTIFF OF DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAW AND A CONSTITUTIONALLY ADEQUATE JUDICIAL REMEDY. THE REMEDY IS INADEQUATE AND A DENIAL OF DUE PROCESS OF LAW BECAUSE A PERSONAL INJUNCTION AGAINST EACH FILM CAN ONLY BE OBTAINED AFTER THE EXHIBITION OF EACH OBSCENE FILM AND LENGTHY LITIGATION; AND AT GREAT COSTS OF ABATEMENT TO THE CITY; AND AT GREAT FINANCIAL RISK TO THE CITY AND ITS OFFICERS AND EMPLOYEES; AND WITHOUT REIMBURSEMENT OF ABATEMENT COSTS FROM THE PERSON MAINTAINING AND PROFITTING FROM SAID PUBLIC NUISANCE; AND WITHOUT THE REMEDY OF AN ATTORNEYS' FEE WHICH REGULARLY IS AWARDED TO OTHER PARTIES IN SUCH ENVIRONMENTAL PROTECTION CASES; AND RESULTS IN A TAKING OF PROPERTY WITHOUT JUST COMPENSATION.

The record herein clearly establishes a moral public nuisance and a "serious wrong (harm)" [10/] for which the law must

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[10/] See Findings of Fact XVII, XVIII, and XIX, at Appendix C-17 and C-18; Conclusion of Law IV at Appendix C-23, Conclusion of Law XVI at Appendix C-29, and Judge Week's opinion at Appendix B-48 through B-54.

provide an adequate remedy.[11/]

It should be noted that, in an obverse situation, where the California State legislature refused to provide funds to satisfy a judgment of the California Supreme Court awarding an attorney's fees "under the substantial" benefit theory in Mandel v. Myers, 29 Cal.3d 531, 174 Cal.Rptr. 841 (June 18,

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11/ California Civil Code Section 3523 provides: "For every wrong there is a remedy." See, also, James Phalen v. Commonwealth of Virginia, 12 L.Ed. 1030, 1033 (1850):

> "The suppression of nuisances injurious to public health or morality is among the most important duties of government. . . . It is a principle of the common law, that the king cannot sanction a nuisance."

It is a fundamental rule of the common law that "the Courts are the guardians of the public morals," Sir Charles Sedley's Case, 1 STD 168; Rex v. Curl, 2 Strange 789 (1727). The power of Courts of Equity, in regard to public nuisances, transcends that of Courts of Law and "is a salutary jurisdiction, expecially where a nuisance affects the health, morals, or safety of the community." Mugler v. Kansas, 123 U.S. 205 at 214 (Dec. 5, 1887).

1981) Chief Justice Bird viewed such denial of a "proper redress" as indicative of government "of men" and not "of law" (dissent, at 564):

> "The real problem here involves the proper remedy for the holders of this valid legal judgment for attorney fees. The dissent is wrong when it concludes that there is no remedy available to these judgment creditors. Chief Justice John Marshall set down the rule of law in 1803 in Marbury v. Madison. 'In the 3d vol. of his Commentaries (p. 23). Blackstone states . . . "In all other cases, . . . it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit, or action at law, whenever that right is invaded." And afterwards (p. 109, of the same vol.), he says, ". . . for it is a settled and invariable principle . . . that every right, when withheld, must have a remedy, and every injury its proper redress." [P] The government of the United States has been emphatically termed a government of laws, and not of men [or women]. It will certainly cease to deserve this high appellation. if the laws furnish no remedy for the violation of a vested legal right.' (Marbury v. Madison (1803) 5 U.S. (1 Cranch) 137, 163, 2 L.Ed. 60).
>
> In the face of the Legislature's unjustified refusal to pay this valid judgment, the state should be treated like any other intransigent civil litigant."

As applied to the trial facts herein, the single right to a personal injunction against a specific obscene film which the Court of Appeal authorizes, is an illusion and fails to provide an adequate remedy. See footnote 12 infra at p. 55. The Mitchell Brothers business practice is to show 2 pornographic films on a program and change the program each week. In 7 years, the theater has exhibited approximately 500 different pornographic titles. The short run of each film and the theater's ability to shorten that run even further, coupled with the practical problem of Plaintiff's not being able to force the defendants to an early trial on the merits in such cases, makes the personal injunction against a specific film worthless, especially where the film itself must be given back at the conclusion of the lawsuit, and it can be expected that each of

such lawsuits will be tenaciously resisted, that the City's costs of abatement will be substantial, and that the costs may not be recovered by the Plaintiff in such lawsuit either as costs of abatement or damages or attorney's fees. On the other hand, the defendants benefit from such prolonged and unproductive litigation, in that the substantial profits being derived from the box office of the moral public nuisance, ($1200.00 per day, see Statement of Facts at page 20, fn. 4; Appendix C-18) provide the defendants with a slush fund which more than underwrites their costs of litigation and allows a substantial profit, whereas the budgetary problems of Cities today make such prolonged and unproductive litigation unattractive.[12/]

[12/] The cost to the City of Santa Ana for the first public nuisance abatement lawsuit was $71,420.20.

II

A. The Court Of Appeal's Reversal Of That Part Of The Trial Court's Judgment Which Ordered "The Payment By The Defendants Of $100,000 Into A Trust Fund For The City's Future Attorney's Fees" Was Arbitrary And Denied The City Attorney, Acting For And On Behalf Of The Residents Of Santa Ana, Equal Protection Of The Law By Denying The Benefits Under California Law Which Accrue To A Prevailing Party Who Acts As A Private Attorney-General In An "Environmental Protection" Lawsuit.

In Serrano v. Priest, 20 Cal.3d 25 at 47, the California Supreme Court exercised its Equity Powers and authorized the payment of attorney's fees in other similar cases where "rights created or protected by the State Constitution are protected to the benefit of a large number of people" and where the "nature of the litigation was such that subsidization of the plaintiff is justified in the event of their victory under the private attorney-general principle". The Serrano rationale is based upon the "private attorney-general concept".

In Code of Civil Procedure section 1021.5 (see Appendix F-11) the State Legislature codified and enlarged upon the Serrano ruling to include cases beyond those vindicating constitutionally based rights, Woodland Hills Residents Assn., Inc. v. City Council of Los Angeles, 23 Cal.3d 917 at 925, and authorized the payment of attorney's fees to others, but included a provision which excluded such payments to "public entities". The statute, which was effective on January 1, 1978, applies to all cases which are on appeal at the time of the enactment, Woodland Hills Residents Assn., Inc. v. City Council of Los Angeles, 23 Cal.3d 917 at 925. A motion for attorney's fees under C.C.P. section 1021.5 need not be made until after the judgment is final, Marini v. Municipal Court for Santa Cruz, etc., 99 Cal.App.3d 829 at 835, 160 Cal. Rptr. 465 at 469. Further, the private attorney-general attorney's fee under C.C.P.

§ 1021.5 can be recovered in a case such as this, where the defendant is a private party, Franzblau v. Monardo, 108 Cal.App.3d 522, 529, 166 Cal.Rptr. 610, 614 (July 24, 1980, hearing denied Sept. 17, 1980).

In Woodland Hills Assn., Inc. v. City Council of Los Angeles, 23 Cal.3d 917 at 936, fn. 11, the California Supreme Court held that an "environmental protection" lawsuit is included with the ambit of C.C.P. §1021.5. Because there is no difference between a "physical" public nuisance and a "moral" public nuisance, see People ex rel. Busch, et al. v. Projection Room Theater, et al., 17 Cal.3d 42, it must follow that an obscenity public nuisance abatement lawsuit to protect the moral environment would also be within the ambit of the statute and, the City Attorney having prevailed and having satisfied the requirements of C.C.P. §1021.5, should be entitled to a private attorney-general attorney's fees, both under

Serrano and C.C.P. §1021.5.

Although C.C.P. §1021.5 contains an exclusion as to "public entities", that section may not logically be interpreted to apply in a situation where the City Attorney is the plaintiff rather than a defendant and the City Attorney is bringing his lawsuit on behalf of the residents in a specific geographical location as an "environmental protection" lawsuit.

Under Owen v. City of Independence, Mo., 445 U.S. 622, which withdrew governmental immunity and made a city (and its residents as taxpayers) absolutely liable for damages and attorney's fees for Civil Rights violations under 42 U.S.C. sections 1983 and 1988; and under Serrano, supra, and C.C.P. section 1021.5, which made such city (and its taxpayers) liable for attorney's fees in environmental protection cases where they, as defendants, are not the prevailing party, it no longer can be reasoned that such "pub-

lic entity" group can be excluded under a "rational" equal protection classification when it as plaintiff prevails in environmental protection (public nuisance abatement) cases. See Builder's Supply Depot v. O'Connor, (1907) 150 Cal. 265, 88 P. 982; Gulf C. and S.F.R. Co. v. Ellis, (1897) 165 U.S. 150; see also, 73 A.L.R.3d 515.

II

B. The Refusal To Permit The City Attorney, Acting For And On Behalf Of The Residents Of Santa Ana, The Right To Recover Damages Resulting From The Public Nuisance Constitutes A Taking Of Property Without Due Process Of Law.

"Damages" resulting from a public nuisance may be recovered in a civil lawsuit. C.C. §3484 (Appendix F-5); C.C.P. §731 (Appendix F-9). Further, a private party may maintain an action for a public nuisance, when it is specially injurious to him, C.C. §3493 (Appendix F-6).

The legislative history and ruling case law clearly establishes that a City Attorney may recover "damages" resulting from a "phy-

sical" public nuisance. For the law prior to 1905, see San Francisco v. Buckman, (1896) 111 C. 25, 43 P. 396. See, also, Johnson v. V.D. Reduction Co., 175 Cal. 63 (1917), which held that the 1905 amendment was not intended to change existing rights. See, also, People, et al. v. City of Los Angeles, 160 C.A.2d 494, 508 (1958), petition for hearing denied on July 11, 1958, holding that a City Attorney could recover "damages" under Code of Civil Procedure section 731 for a "physical" public nuisance (discharge of sewage).

California law makes no distinction between a "physical" public nuisance and a "moral" public nuisance. People ex rel. Busch, et al. v. Projection Room Theater, 17 Cal.3d 42 (1976). Therefore, the right of the City Attorney to recover "damages" clearly exists under C.C.P. section 731.

Under the Court of Appeal's judgment, an obvious injustice results. The residents

of Santa Ana have a fundamental common law right to abate a public nuisance (which is also a private nuisance to them), and to recover damages for the harm occasioned by its proximity to their real estate. Under California case law, that may only be accomplished if the City Attorney brings that action, in that a resident does not have "standing" to abate a moral public nuisance which is a private nuisance to the resident. See Harmer, et al. v. Deep Throat, No. 76-1522, 432 U.S. 907 (June 20, 1977); Harmer, et al. v. Devil in Miss Jones, No. 76-1110, 430 U.S. 967 (Apr. 18, 1977). If the residents do not have "standing" and the City Attorney may not recover "damages" on their behalf, the result is a taking of property without due process of law.

This Court has made the City (and its taxpayers) absolutely liable for damages, for civil rights violations, Owen v. City of Independence, Mo., supra. Had the City

failed to prevail on the "Burden of Proof" issue and on the merits, the Mitchell Brothers would have had recourse for damages and attorney's fees under 42 U.S.C. sections 1983 and 1988. Where the City Attorney, as plaintiff, prevails on the merits, substantive due process and equal protection of the laws require that he be allowed to recover "damages" on behalf of the residents whose property has been injured by the "per se" public nuisance. Nebbia v. New York, 291 U.S. 502 (1934); Skinner v. Oklahoma, 316 U.S. 535 (1942).

II

C. The Trial Court's Discretion To Award An Attorney's Fee In An "Environmental Protection" Lawsuit Brought By The City Attorney On Behalf Of The Residents Of Santa Ana, Is Controlled By C.C.P. §1021.5. Upon Remand Petitioner Is Entitled To The Allowance Of An Attorney's Fee Which Is Not Subject To The "Public Entities" Exclusion Of C.C.P. Section 1021.5.

Pursuant to the above rationale, the trial court's discretion to award an attorney's fee in an "environmental protection"

lawsuit brought by the City Attorney on behalf of the residents of Santa Ana, is controlled By the public policy expressed in Serrano, supra, and C.C.P. §1021.5. Upon remand, an attorney's fees should be awarded to Petitioner, both at the trial level and upon appeal. See Woodland Hills Assn., Inc. v. City Council of Los Angeles, 23 Cal.3d 917 at 948, fn. 15; Serrano v. Priest, 20 Cal.3d 25, 50 (Nov. 17, 1977).

Petitioner requests this Court to grant its writ of certiorari on the "due process" and "equal protection of the law" issues, which confront the "public entities" exclusion of C.C.P. §1021.5, so that a definitive ruling on those issues may also be had.

CONCLUSION

The trial judge ruled that, upon the trial record before him, he would have closed the theater if he could, but that he was prevented from doing so by the California Supreme Court's interpretation that the

same was an unlawful prior restraint under the U.S. Constitution. The Idaho Supreme Court has held, to the contrary, that an Equity Court can close a premises which presently constitutes a public nuisance (Obscenity) as a penalty for past unlawful conduct. The question of "closure" is ripe for review under Rule 17(b).

This Court should also grant this petition and decide whether the Court of Appeal's judgment, denying all public nuisance abatement remedies except a personal injunction against a specific obscene film, has deprived the Petitioner of a constitutionally adequate remedy, and whether the "public entities" exclusion of C.C.P. §1021.5 bars Petitioner's recovery of attorney's fees under the private attorney-general concept.

DATED: August 24, 1982

Respectfully submitted,

_____

James J. Clancy
Attorney for Petitioner.

CERTIFICATE OF SERVICE

I, hereby certify that on this 25th day of August, 1982, the original and 40 copies of the within Petition for Writ of Certiorari were deposited in the United States Post Office in Phoenix, Arizona, with first-class postage prepaid, and properly addressed to the Clerk of the United States Supreme Court.

I further certify that three (3) copies were also mailed, postage prepaid, to the below listed parties to the proceedings and that all parties required to be served have been served.

LAW OFFICE OF ROBERT L. THORP, JR.
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James J. Clancy
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Attorney for Petitioner.

APPENDIX A

(Reference: Petition at pg. 2, 22.)

Opinion of the Court of Appeal, Fourth Appellate District, Division 2, in People of the State of California, ex rel. Gow, City Attorney of the City of Santa Ana, California v. Mitchell Brothers' Santa Ana Theater, et al., 114 Cal. App.3d 923, 171 Cal. Rptr. 85 (Jan. 20, 1982).

.....A-1 thru A-36

PEOPLE of the State of California ex rel. Keith GOW, City Attorney of the City of Santa Ana, California, Plaintiffs and Appellants,

v.

MITCHELL BROTHERS SANTA ANA THEATER et al., Defendants and Appellants.

Civ. 19940.

Court of Appeal, Fourth District, Division 2.

Jan. 20, 1981.

Joseph Rhine, Hollywod, Wiliam K. Maas, Jr., Martinez, and Robert Thorp, San Francisco, for defendants and appellants.

James J. Clancy, Sun Valley, for plaintiffs and appellants.

MORRIS, Associate Justice.

The plaintiff and the defendants appeal following a trial to determine whether the showing of allegedly obscene films by the defendant constituted a public nuisance The case was tried in part by a jury and in part to the court. Judgments were entered finding certain of defendants'

films obscene and granting part of the relief requested by plaintiff.

Facts

Pursuant to Code of Civil Procedure section 731, [1] the Santa Ana City Attorney ("City") brought an action against the owners and operators of the Mitchell Brothers' Santa Ana Theater ("defendants") to abate a public nuisance. The City's Complaint listed numerous films shown by the defendants between November 28, 1975 and March 30, 1977, all of which were alleged

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1. Code of Civil Procedure section 731 reads, in pertinent part:

> "An action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by a nuisance, as the same is defined in section thirty-four hundred and seventy-nine fo the Civil Code- and by the judgment in such action the nuisance may be enjoined or abated as well as damages recovered therefor. A civil action may be brought in the name of the people of the State of California to abate a public nuisance, as the same is defined in section thirty-four hundred and eighty of the Civil Code, . . . by the city attorney of any town or city in which such nuisance exists. . ."

to obscene. It was alleged that the showing of these films constituted a public nuisance as defined by Civil Code sections 3479 and 3480.[2] The City sought the following relief: that the court approve a resolution passed by the Santa Ana City Council revoking all of the defendants' operating licenses and permits; that the defendants be permanently enjoined from showing the named films; that the named films be destroyed by the State; that the box office receipts from the showing of the

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2. Civil Code section 3479 reads:

"Anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life of property, or unlawfully obstructs the free passage or bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance."

Civil Code section 3480 reads:

"A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal."

films be forfeited; that the defendants' theater be closed for one year; that the theater's fixtures and movable property be removed by the police and sold; that the plaintiff receive compensatory and punitive damages, and that the plaintiff recover costs and attorney's fees.

The court ruled that the issues of obscenity, public nuisance, and damages would be decided by a jury prior to the court's resolution of the equitable remedies issues. The court reasoned that since all relief sought by the City was dependent on a prior finding of obscenity and nuisance, a "prior resolution of the equitable issues would require a judicial determination of the issues of 'obscenity' and 'public nuisance' and would thus deprive defendants of a full and meaningful jury trial on the issue of damages." The jury trial itself was bifurcated. The jury first decided the issues

of obscenity and public nuisance and then determined the amount of damages recoverable.

During the obscenity and public nuisance phase of the trial, the jury viewed 17 films at the defendants' theater.[3] The jury also heard extensive testimony from both lay and expert witnesses. After all the evidence had been presented, the jury was read over 50 separate instructions. Included in the instructions was the requirement that a film could be found obscene only if the jurors were convinced of such "beyond a reasonable doubt". The jury found 11 films

3. The City's complaint sought relief against 41 films, but only the 17 films that were viewed were within the control of the defendant. The City sought to enter into evidence still photographs of portions of all 41 films, which were termed "time and motion studies". The court denied the motion as to the 17 films under the Best Evidence Rule (Evid.Code, § 1500). The "time and motion studies" for the other 24 films were first admitted, but were later excluded from evidence as unduly prejudicial under Evidence Code section 352.

obscene, 4 not obscene and could not reach a verdict on the remaining two.

After further presentation of evidence during the damages phase of the trial, the jury was instructed on the issues of nominal, compensatory and punitive damages. The jury awarded a total of $76,400 in compensatory damages and awarded no punitive damages.

Thereafter, the court issued its judgment and findings of fact and conclusions of law on the equitable issues. The court ruled in favor of the defendants on the issues of a constructive trust on the theater's box office receipts, the revocation of defendants' license, and the closing of the theater for one year. In the City's favor, the court permanently enjoined the exhibition or advertising by the defendants of the same 11 films which had been found obscene by the jury; ordered

the defendants to allow the City's officers "free and total access to all parts of the theatre" for a two-year period for monitoring purposes; ordered the defendants to deposit $100,000 "in trust for the City . . . as a security deposit against future attorney fees, costs, and expenses incurred by the City" in abating future nuisances by the defendants within a two-year period; ordered the destruction of the 11 "motion picture film prints" that were found obscene; and awarded the City the recovery of $5,869.31 in costs.

In total, five notices of appeal were filed. The defendants appealed and the City both appealed and cross-appealed "from the jury verdicts" on the issues of obscenity and damages. [4]

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4. This court has no power to hear an appeal from a jury verdict, as such is not appealable, (Code Civ.Proc., § 904.1.) However, since there was filed a "Judgment on Verdicts in Open Court", we will treat the appeals as being from that judgment. (Jackson v. Lovas (1951) 106 Cal.App.2d 426,

(Footnote Continued On Next Page.)

Additionally, the City and the defendants appealed from those portions of the "Judgment After Trial By Court" that were adverse to them. The errors asserted by the parties are two numerous to summarize at this point.[5] They will be dealt with at the appropriate parts of our discussion.

Obscenity as a Public Nuisance

427, 235 P.2d 232; see also In re Edgar M. (1975) 14 Cal.3d 727, 740, 122 Cal.Rptr. 574, 537 P.2d 406; A. L. Castle, Inc. v. County of San Benito (1964) 227 Cal.App.2d 602, 603-605, 38 Cal.Rptr. 855; but see Estate of Roberson (1952) 114 Cal.App.2d 267, 250 P.2d 179, where this court expressed the fear that allowing an appeal in a case such as the present one "would open the door to all manner of abuses." Such concern has subsequently been proved unfounded.)

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5. Some mention of the City's opening brief is necessary. Rarely has there such a total disregard for that section of Rule 13 of the Rules of Court which requires the statement of the case to be "(set) forth concisely." The "brief" spans 272 pages (at 36 lines to the page) and is supplemented by a 317-page "Expanded Statement of Facts." While such a large document is occasionally helpful (Conaway v. Yolo Water & Power Co. (1928) 204 Cal. 125, 127, 266 P. 944), most often, as here, it is not. (King v. Gildersleeve (1889) 79 Cal. 504, 507-508, 21 P. 961; Couts v. O'Neill (1921) 51 Cal.App. 152, 158, 196 P. 109.)

Obscenity as a Public Nuisance

The defendants spend considerable time arguing that the use of equitable remedies in a civil action to abate a public nuisance is not a valid method of regulating obscenity. Although the California Supreme Court has expressly ruled contrary to this position (People ex rel. Busch v. Projection Room Theater (1976) 17 Cal.3d 42, 130 Cal.Rptr. 328, 550 P.2d 600, cert. den. sub nom., Van de Kamp v. Projection Room Theater, 429 U.S. 922, 97 S.Ct. 320, 50 L.Ed.2d 289), the defendants criticize the ruling as "imprudent" and ask us nevertheless to uphold their argument. This we cannot do. Few principles of law are more basic than that courts are bound by the decisions of those other courts which exercise superior jurisdiction. (Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450, 455,

20 Cal.Rptr. 321, 369 P.2d 937.) Since Busch holds that a state may regulate the exhibition of obscene matter by application of public nuisance statutes (17 Cal.3d at p. 55, 130 Cal.Rptr. 328, 550 P.2d 600), we must conclude that the present action was properly brought.[6]

Busch, however, dealt only with a trial court's judgment sustaining a demurrer without leave to amend. And, since no reported case in this state has yet reviewed a final judgment following a full trial in a Busch-type lawsuit, many issues regarding trial procedures and remedies in

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6. Additionally, we note that the use of other types of civil proceedings to regulate obscenity in this state has been held valid. In People v. E.W.A.P., Inc. (1980) 106 Cal.App.3d 315, 165 Cal.Rptr. 73, hg. den. on Aug. 21, 1980, the court approved the application of Business and Professions Code section 17200 et seq., which provides for injunctions and civil penalties against those engaging in unfair competition, to a company involved in the commercial distribution of obscene films and magazines.

such an action remain to be addressed.[7]

Remedies

The defendants contend, on a variety of theories, that the trial court erred in granting any of the relief sought by the City. The City, on the other hand, cites numerous alleged errors by the trial court that led to what it contends was a wrongful denial of other requested remedies. We need not deal with each asserted error since we hold that in this case, injunctive relief against those movies found to be obscene is the only remedy allowable under the public nuisance

7. Three cases have involved appeals in Busch actions, but all dealt with pre-trial issues. People ex rel. Gow v. Mitchell Bros'. Santa Ana Theater (1980) 101 Cal.App.3d 296, 161 Cal.Rptr. 562 (appeal from order granting preliminary injunction); In re Ward (1978) 82 Cal.App.3d 981, 147 Cal.Rptr. 476 (petition for writ of habeas corpus following sentence for contempt of court for violation of preliminary injunction); People ex rel. Camil v. Buena Vista Cinema (1976) 57 Cal.App.3d 497, 129 Cal.Rptr. 315 (Appeal following sustaining of demurrer to cause of action seeking relief under public nuisance statutes against obscene motion picture theater).

statutes. Thus, the trial court erred in awarding damages to the City, in allowing the City's officer "free and total access to all parts of the theatre," in ordering the maintenance of a $100,000 "trust fund" for possible future City legal costs, and in ordering the destruction of the 11 films found to be obscene.

This action was brought under the authority of Code of Civil Procedure section 731, which, inter alia, empowers a city attorney to bring a civil action "to abate a public nuisance." Abatement, however, is the sole relief that section 731 authorizes the city attorney to seek. This is evident when the above-quoted language is compared to the first portion of the statute. That portion allows an action to be brought by "any person whose property is injuriously affected, or whose personal enjoyment is lessened by a

nuisance . . . ." Such a person is expressly authorized to seek a judgment where "the nuisance may be enjoined or abated as well as damages recovered therefor." (Emphasis added.) It is clear that the Legislature intended that one type of litigant could seek abatement and damages, while the other type of litigant could obtain abatement only. A city attorney, in an action "brought in the name of the people," fits squarely and exclusively in the latter classification.

The City attempts to fit itself into the class of litigants who can seek damages by relying on Civil Code section 14, which provides that "the word person includes a corporation as well as a natural person."[8]

8. The City has erroneously cited section 14, which defines words and phrases used in the Civil Code only. However, the identical definition of "person" appears in Code of Civil Procedure section 17, which defines words and phrases used in the Code of Civil Procedure, of which the subject section 731 is a part. We thus treat the City's argument as based on section 17.

The City reasons that since the action was brought by the city attorney at the direction of an incorporated city, this somehow converts the action into one brought by a "person whose property is injuriously affected, or whose personal enjoyment is lessened by a nuisance." This argument borders on the frivolous. We agree with the defendants that "(w)ord games are being employed by Respondent to circumvent the straight-forward provisions of the code." Since abatement is the only relief that can be granted in this case, the portion of the judgment awarding damages must be reversed.

We also conclude that the other remedies granted by the trial court, except for the injunction, are inconsistent with the language of section 731. The City's arguments to the contrary appear to stem from an erroneous view of what

constitutes the public nuisance that may be abated. This misunderstanding can be seen from the City's extensive argument concerning the asserted error of the trial court in refusing to close the defendants' theater for a period of time. The theater should be closed, the City contends, because "(t)he suppression of nusiances injurious to public health or morality is among the most important duties of government." (Phalen v. Commonwealth of Virginia (1850) 49 U.S. (8 How.) 163, 168, 12 L.Ed. 1030, 1033.) It thus appears that the City believes that it is the theater that consitutes the public nuisance.[9] This is an

9. We need not long address the merits of the City's contention that the trial court erred in not closing the defendants' theater. Busch held that such relief "would result in a full and pervasive prior restraint upon the freedom of speech and of the press in violation of the First and Fourteenth Amendments to the United States Constitution." (17 Cal.3d at p. 58, 130 Cal.Rptr. 328, 550 P.2d 600.) The City's argument that this language is merely dictum which does not bind this court is unpersuasive.

incorrect reading of the Busch decision. In Busch, the court states that "the exhibition of obscene magazines and films . . . may be characterized as 'indecent' or 'offensive to the senses'" (17 Cal.3d at p. 49, 130 Cal.Rptr. 328, 550 P.2d 600), talks about "the state's interests in regulating the exhibition of obscene matter" (id., at p. 51, 130 Cal.Rptr. 328, 550 P.2d 600), and concludes that "public nuisance laws may properly be employed to regulate the exhibition of obscene material to 'consenting adults.'" (Id., at p. 53, 130 Cal.Rptr. 328, 550 P.2d 600, emphasis added.) Thus, the public nuisance is not the Theater, nor even the obscene films themselves.[10] It is the exhibition of those

10. That obscene films are not, in and of themselves, public nuisances is recognized in Busch. The court noted (17 Cal.3d at pp. 51-52, 130 Cal.Rptr. 328, 550 P.2d 600) the difference between Stanley v. Georgia (1969) 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 and the cases of Paris Adult Theatre I v. Slaton (1973) 413 U.S. 49, 93 S.Ct.

(Footnote Continued On Next Page)

obscene films in the theater that constitutes a public nuisance.

Once it is recognized that the public nuisance is nothing more than the act of exhibiting obscene films, it becomes apparent why all the remedies, save the injunction, are inappropriate. The injunction against the advertisement or exhibition of the 11 obscene films is sufficient to afford the City as full relief as is possible in a section 731 action, i.e., the abatement of the public nuisance. The $100,000 trust fund, the free access to the theater by the City's agents, the destruction of

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2628, 37 L.Ed.2d 446 and People v. Luros (1971) 4 Cal.3d 84, 92 Cal.Rptr. 833, cert. den., 404 U.S. 824, 92 S.Ct. 51, 30 L.Ed.2d 52. Stanley held unconstitutional a prosecution for the private possession of obscene films. Paris and Luros stated, however, that the commercial distribution of obscenity, even to consenting adults, could be constitutionally regulated. Thus, obscene films do not become legally objectionable until they are publicly exhibited or distributed. For this reason in particular, the trial court's order to destroy the 11 obscene films in this case is incorrect.

the obscene films, and the money damages are unauthorized in an action to abate a public nuisance.

The Supreme Court stated the governing principle in Anderson v. Souza (1952) 38 Cal.2d 825, 840-841, 243 P.2d 497: "Injunctive process ought never to go beyond the necessities of the case and where a legitimate business is being conducted and in the conduct thereof a nuisance has been created and is being maintained, the relief granted should be directed and confined to the elimination of the nuisance . . . ." (Emphasis added.) (See also Wade v. Campbell (1962) 200 Cal.App.2d 54, 62, 19 Cal.Rptr. 173; Morton v. Superior Court (1954) 124 Cal.App.2d 577, 582-585, 269 P.2d 81.)[11] Indeed Busch

11. The general rule set forth in Anderson is of particular importance in cases, such as the present one, that involve First Amendment rights:

> "An order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the

(Footnote Continued On Next Page)

holds that abatement in this case is to be accomplished by a "proper and suitable" injunction (17 Cal.3d at p. 57, 130 Cal.Rptr. 328, 550 P.2d 600) and that such abatement "must be directed to particular books or films which have been adjudged obscene following a fair and full adversary hearing, rather than against the premises in which the material is sold, exhibited or displayed." (Id., at p. 59, 130 Cal.Rptr. 328, 550 P.2d 600.)

In summary, we hold that the only purpose of a section 731 action by a city

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pinpointed objective permitted by constitutional mandate and the essential needs of the public order. In this sensitive field, the State may not employ 'means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.' (Citation.) In other words, the order must be tailored as precisely as possible to the exact needs of the case." (Carroll v. President & Commissioners of Princess Anne (1968) 393 U.S. 175, 183-184, 89 S.Ct. 347, 352, 21 L.Ed.2d 325, emphasis added; see also United Farm Workers Organizing Committee v. Superior Court (1971) 4 Cal.3d 556, 570, 94 Cal.Rptr. 263, 483 P.2d 1215.)

attorney is "to abate a public nuisance." To accomplish anything else would be beyond the scope of such an action. The public nuisance in this case is the exhibition of obscene films. If the defendants are permanently enjoined from advertising or exhibiting the films that were found obscene, the public nuisance will have been abated. The other remedies are excessive.

Trial Procedures

In reviewing the procedures employed in the trial court to resolve the issues of obscenity and public nuisance, we are aware of the special constitutional considerations relevant to this type of case. The United States Supreme Court has recently stated that "the regulation of a communicative activity such as the exhibition of motion pictures must adhere to more narrowly drawn procedures than is necessary for the abatement of an ordinary nuisance." (Vance v. Universal Amusement Co., Inc.

(1980) 445 U.S. 308, 315, 100 S.Ct. 1156, 1160-1161, 63 L.Ed.2d 413.) And, as was noted in Busch, "the California public nuisance statutes must be enforced in such a way as to operate in a constitutional fashion." (17 Cal.3d at p. 55, 130 Cal.Rptr. 328, 550 P.2d 600.)

It is well settled that obscenity is not protected by the First Amendment. (Roth v. United States (1957) 354 U.S. 476, 484, 485, 77 S.Ct. 1304, 1308, 1309, 1 L.Ed.2d 1498.) But, care must be taken in determining what is obscene so as not to interfere with matter that is entitled to a constitutional shield. The job of the courts is to "distinguish commerce in ideas, protected by the First Amendment, from commercial exploitation of obscene material." (Miller v. California (1973) 413 U.S. 15, 36, 93 S.Ct. 2607, 2621, 37 L.Ed.2d 419.) Unarguably, this

distinguishing process must include a "judicial determination in an adversary proceeding." (Freedman v. Maryland (1965) 380 U.S. 51, 58, 85 S.Ct. 734, 738, 13 L.Ed.2d 649; see also Paris Adult Theatre I v. Slaton, supra, 413 U.S. 49, 55, 93 S.Ct. at 2633; Busch, supra, 17 Cal.3d at p. 57, 130 Cal.Rptr. 328, 550 P.2d 600.)

At the outset, we deal with the defendants' contention that a Busch action cannot be maintained in this case. Defendants cite the language in Busch that framed the issue in that case: "we consider whether or not a civil action brought by law enforcement officers to restrain the exhibition of obscene books and films states a cause of action for relief under the public nuisance laws of this state." (17 Cal.3d at p. 47, 130 Cal.Rptr. 328, 550 P.2d 600.) Since the court did not describe the action as one to restrain the exhibition of

allegedly obscene books and films, the defendants argue that Busch applies only where there has been a final judicial determination of obscenity prior to the filing of the public nuisance action. We disagree. It is clear that Busch only requires a judicial determination of obscenity as a condition precedent to the granting of any permanent injunctive relief, not as a prerequisite to the bringing of the action in the first place. We also find it significant that the two post-Busch cases upholding the issuance of preliminary injunctions were both actions against the exhibition of "allegedly" obscene motion pictures (People ex rel. Gow v. Mitchell Bros.' Santa Ana Theater, supra, 101 Cal.App.3d at p.299, 161 Cal.Rptr. 562; In re Ward, supra, 82 Cal.App.3d at p. 983, 147 Cal.Rptr. 476.)

The city asserts as error

the court's pre-trial ruling that the defendants were entitled to a jury trial on the questions of obscenity and nuisance. We need not, however, address the issue of the right to a jury trial in Busch actions. If the court's ruling was error,[12] the City was not harmed by it and

12. As this court has noted before (People ex rel. Gow. v. Mitchell Bros'. Santa Ana Theater, supra, 101 Cal.App.3d at p. 305, fn. 9, 161 Cal.Rptr. 562), it appears that there is no constitutional right to a jury trial in a public nuisance obscenity case. (See also Alexander v. Virginia (1973) 413 U.S. 836, 93 S.Ct. 2803, 37 L.Ed.2d 993; Penthouse Intern., Ltd. v. McAuliffe (5th Cir. 1980) 610 F.2d 1353, 1363, cert. dis., ___ U.S. ___, 100 S.Ct. 3031, 65 L.Ed.2d 1131.) This is true despite seemingly contradictory language in cases decided contemporaneously with Alexander. In Paris Adult Theatre I v. Slaton, supra, the court validated civil actions to regulate obscenity as long as the state law "meets the First Amendment standards set forth in Miller v. California". (413 U.S. at p. 69, 93 S.Ct. at p. 2641). Miller v. California (1973) 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419, enunciates the test to be applied in obscenity cases, which test includes the application of "contemporary community standards." (413 U.S. at p. 24, 93 S.Ct. at p. 2615.) Miller also instructs that "(i)n resolving the inevitably sensitive questions of fact and law, we must continue to rely on the jury system, accompanied by the safeguards that judges, rules of evidence, presumption of innocence, and other protective features provide . . . ." (413 U.S.

(Footnote Continued On Next Page)

thus cannot raise it on appeal. (Code Civ.Proc., § 475.) Despite the court's ruling, it is clear,as even the City for some reason argues, that when the court made its order concerning the injunction, it exercised a fact-finding judgment independent from the verdicts of the jury.[13]

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at p. 26 93 S.Ct. at 2616, emphasis added.) A jury trial thus seems to be a significant part of the "First Amendment standards set forth in Miller." (See also Note, The Devil and the D.A.: The Civil Abatement of Obscenity (1977) 28 Hastings L.J. 1329, 1337-1340; Note, Obscene Material as a Public Nuisance (1977) 65 Cal.L.Rev. 330, 340; McKinney v. Alabama (1976) 424 U.S. 669, 687-689, 96 S.Ct. 1189, 1199, 47 L.Ed.2d 387 (conc. opn. of Brennan, J.); People v. E.W.A.P., Inc., supra, 106 Cal.App.3d 315, 325, 165 Cal.Rptr. 73 (dis. opn. of Kaus, P.J.).)

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13. Conclusion of law number IV of the trial court's "Findings of Fact and Conclusions of Law" preceded a list of eleven filmsby stating: "Based upon the Court's personal viewing, each of the following motion picture films named below constitute subject matter which is obscene beyond a reasonable doubt, as the term 'obscene' is defined in Penal Code Section 311(a) . . ." (Emphasis added.) During a hearing concerning the "Findings of Fact and Conclusions of Law", the judge explained that the Conclusion of Law "intended to show based upon the court' personal viewing rather than the jury's deliberations, because I personally viewed these films also. And I am making this, made the decision on the equitable issues that each of the

(Footnote Continued On Next Page)

Since we have held that the injunction is the only proper remedy in this case, the jury was at most an advisory body. If any party is entitled to raise the jury trial issue it is the defendants. They did not however, raise it.

The city also contends that the trial court erred in requiring the fact of obscenity to be proved "beyond a reasonable doubt." The court established the high burden of proof based on the reasoning of Mr. Justice Brennan's concurring opinion in McKinney v. Alabama, supra, 424 U.S. 669, 678, 96 S.Ct. 1189, 1195 (conc. opn. of Brennan, J.). The City relies on Mugler v. Kansas (1887) 123 U.S. 623, 8 S.Ct. 273, 31 L.Ed. 205, to support its position that the burden of proof should be by "clear

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following motion pictures named below constitute subject matter which is obscene beyond a reasonable doubt as the term defined in Penal Code section 311(a)." (Emphasis added.)

and convincing evidence."[14] We agree with the trial court that the issue of obscenity vel non in a public nuisance abatement action must be proved beyond a reasonable doubt.

Mugler involved the constitutionality of a Kansas law that, inter alia, required the closing as a "common nuisance" of those buildings found by a court to be "places where intoxicating liquors are manufactured, sold, bartered, or given away . . ." (123 U.S. at p. 670, 8 S.Ct. at p. 301.) In rejecting the defendants' contention that the procedures under the statute violated due process of law, the Court stated: "The court is not to issue an injunction simply

14. Apparently, the City concedes that the "preponderance of the evidence" burden of proof would be inadequate. Although arguing that the burden should have been a "preponderance of the evidence" for the jury trial on damages, the City states that "the burden of proof on the equitable trial should have been by 'clear and convincing' evidence." We are only concerned with the burden of proof for the latter, since we hold that the injunction is the only appropriate remedy.

because one is asked, or because the charge is made that a common nuisance is maintained in violation of law. The statute leaves the court at liberty to give effect to the principle that an injunction will not be granted to restrain a nuisance, except upon clear and satisfactory evidence that one exists." (123 U.S. at p. 673, 8 S.Ct. at p. 303, emphasis added.) If this were a normal public nuisance abatement action, this language from Mugler might be persuasive. (See e.g., People v. Frangadakis (1960) 184 Cal.App.2d 540, 550, 7 Cal.Rptr. 776 (burden of proof in action to abate a public nuisance under Bus. & Prof.Code, § 25604 is by a preponderance of the evidence.).) This is not, however, a normal action. As we noted earlier, the Supreme Court has recognized that "more narrowly drawn procedures" are required when the nuisance to be abated is the

exhibition of obscene films. (Vance v. Universal Amusement Co., Inc., supra, 100 S.Ct. at pp.1160-1161.) We conclude that one of the required procedures is that obscenity be proven beyond a reasonable doubt.

In McKinney v. Alabama, Mr. Justice Brennan wrote a concurring opinion concerning the procedural problems involved in a civil obscenity action. In a portion of that opinion, which was joined by Mr. Justice Marshall and Mr. Justice Stewart, Brennan dealt with the issue of the burden of proof in such actions. (424 U.S. at pp. 683-687, 96 S.Ct. at p. 1197.) It was there concluded that "the hazards to First Amendment freedoms inhering in the regulation of obscenity require that even in . . . a civil proceeding, the State comply with the more exacting standard of proof beyond a reasonable doubt." (Id., at pp. 683-684, 96 S.Ct. at p. 1197.)

Although we agree with the entire "burden of proof" portion of the Brennan opinion, one passage is particularly persuasive:

> "Inherent in all factfinding procedures is the potential for erroneous judgments and, when First Amendment values are implicated, the selection of a standard of proof of necessity implicates the relative constitutional acceptability of erroneous judgments. 'There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value . . . this margin of error is reduced as to him by the process of placing on the other party the burden . . . of persuading the factfinder at the

conclusion of the trial of (the existence of the fact) beyond a reasonable doubt.' Speiser v. Randall, 357 U.S. 513, 525-526, 78 S.Ct. 1332, 1342, 2 L.Ed.2d 1460, 1472 (1958). See, e.g., In re Winship, 397 U.S. 358, 369-372, 90 S.Ct. 1068, 1075-1076, 25 L.Ed.2d 368, 378-380 (1970) (Harlan, J., concurring). . . . In the civil adjudication of obscenity vel non, the bookseller has at stake such an 'interest of transcending value'-protection of his right to disseminate and the public's right to receive material protected by the First Amendment. Protection of those rights demands that the factfinder be almost certain-convinced beyond a reasonable doubt-that the materials are not constitutionally immune from suppression." (424 U.S. at p. 684, 96

S.Ct. at p. 1197, original emphasis.)

Discovery

One month prior to the commencement of the jury trial in this action, on of the defendants (James Mitchell) was ordered to pay $5,000 in sanctions to the City's counsel for noncompliance with earlier discovery orders. The defendants now seek a reversal of that order.[15]

15. Despite the City's contention to the contrary, the order is properly before this court for review. The City argues that the "collateral order doctrine" (see generally In re Marriage of Skelley (1976) 18 Cal.3d 365, 368, 134 Cal.Rptr. 197, 556 P.2d 297; Sjoberg v. Hastorf (1948) 33 Cal.2d 116, 119, 199 P.2d 668) makes the order imposing sanctions an appealable one which was subject to review here only upon a timely appeal from that order or a petition for a prerogative writ. However, while the collateral order doctrine has been applied to make appealable orders imposing sanctions for an attorney's misconduct at trial (Bauguess v. Paine (1978) 22 Cal.3d 626, 634, fn. 3, 150 Cal.Rptr. 461, 586 P.2d 942) and for a party's failure to attend a mandatory settlement conference (Wisniewski v. Clary (1975), 46 Cal.App.3d 499, 502, 120 Cal.Rptr. 176), it has been held not to apply to orders imposing sanctions for refusal to make discovery. (Lund v. Superior Court (1964) 61 Cal.2d 698, 709, 39 Cal.Rptr. 891, 394 P.2d 707; Freidberg v. Freidberg (1970) 9 Cal.App.3d 754, 764, 88 Cal.Rptr. 451; Munson v. Singer (1965) 238 Cal.App.2d 697, 48

(Footnote Continued On Next Page)

We find it impossible to reverse the order imposing sanctions because defendants have provided an inadequate record. The $5,000 sanction was imposed as part of the court's "Second Order Compelling Answers to Questions and Production of Documents and Things, and for Reasonable Expenses and Attorney's Fees." That order required Mitchell to answer well over 100 deposition questions and produce four different types of documents. Defendants make a broad attack on this order, claiming that the questions and documents relate to the defendants' finances and that financial information is relevant only where punitive damages are proper. The defendants cannot prevail on this issue for two separate reasons. First, the record is incomplete in that it does not contain 49

Cal.Rptr. 167.) Thus, the order here complained of is nonappealable on its own and may be reviewed now that a final judgment in the case has been entered. (See Code Civ.Proc., § 906.)

of the deposition questions that Mitchell was required to answer.[16] Second, the defendants have failed to specify how the questions and documents relate to their finances.[17] The defendants have not carried their burdens of making an affirmative showing of error by an adequate record (In re Kathy P. (1979) 25 Cal.3d 91, 102, 157 Cal.Rptr. 874, 599 P.2d 65; Rossiter v. Benoit (1979) 88 Cal.App.3d 706, 711-712, 152 Cal.Rptr. 65) or of pointing out reversible error in their

16. The court ordered Mitchell to answer, inter alia, "those questions set forth in the Declaration of James J. Clancy in support of plaintiff's Motion numbered 80 through 128 . . ." This declaration, however, is not in the record.

17. A cursory review of the discovery orders reveals that most of the questions which Mitchell was required to answer have nothing to do with economics. For example: "Would you say that 'Behind the Green Door' was hard-core pornography?", "How does Cinema 7, Inc., determine what films are going to be shown at various theaters?", "Who wrote the film play, 'Sodom and Gomorrah'?", "Did you do any camera work on "Resurrection of Eve'?", "Are there different versions of the film, 'Sodom and Gomorrah', or are they all essentially the same?"

brief (Fox v. Erickson (1950) 99 Cal.App.2d 740, 741-742, 222 P.2d 452.)

We have considered, but do not discuss, the numerous other points raised by both parties. Most concerned asserted errors during the jury trial for damages, which we have decided should not have been held. The remaining points are completely unmeritorious.

The $5,000 discovery sanction and those parts of the "Judgment After Trial by Court" enjoining the defendants from advertising or exhibiting the eleven films found by the trial court to be obscene beyond a reasonable doubt and denying the City's requests for a constructive trust on the defendants' box office receipts, a revocation of the defendants' license, and the closure of defendants' theater for one year are affirmed. The "Judgment on Verdicts in Open Court" awarding $76,400

in compensatory damages to the City and those parts of the "Judgment After Trial By Court" ordering access for the City's officers to all parts of the defendants' theater for two years, the payment by the defendants of $100,000 into a trust fund for the City's future attorney fees, and the destruction of the prints of the films declared obscene are reversed.

GARDNER, P. J., and McDANIEL, J., concur.

APPENDIX A

(Reference: Petition at pg. 2, 26.)

Opinion of the Court of Appeal Fourth Appellate District, Division 2, After Remand from the U.S. Supreme Court in People, ex rel. Cooper, City Attorney of the City of Santa Ana, California v. Mitchell Brothers' Santa Ana Theater, et al., 4 CIV 19940 (Superior Court Case No. 25-63-30) decided February 18, 1982.

.....A-37 thru A-44

PEOPLE of the State of California ex rel. Edward COOPER, City Attorney of the City of Santa Ana, California, Plaintiff and Appellant,

v.

MITCHELL BROTHERS' SANTA ANA THEATER et al., Defendants and Appellants.

4 CIV. 19940

Court of Appeal, Fourth District, Division Two

Feb. 18, 1982

APPEAL from the Superior Court of Orange County, Marvin G. Weeks, Judge,* Remanded.

Robert L. Thorp for Defendants and Appellants.

James J. Clancy for Plaintiff and Appellant.

The Supreme Court of the United States on November 30, 1981, issued its judgment and mandate that the judgment of the Court of Appeal "in this cause is reversed," and "that this cause is

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*Assigned by the Chairperson of the Judicial Council.

remanded to the Court of Appeal of California, Fourth Appellate District, for further proceedings not inconsistent with the opinion of this Court."

The opinion of the United States Supreme Court, reported at ___ U.S. ___ (70 L.Ed.2d 262, 102 S.Ct. 172), disapproved a portion of this Court's earlier opinion which held that the issue of obscenity vel non in a public nuisance abatement action must be proved beyond a reasonable doubt. (People ex rel. Gow v. Mitchell Brothers' Santa Ana Theater (1981) 114 Cal.App.3d 923, 935-937). The Supreme Court concluded that "while a State may require proof beyond reasonable doubt in a () (civil) obscenity case, that choice is solely a matter of state law. The First and Fourteenth Amendments do not require such a standard." (___ U.S., at page ___ (70 L.Ed.2d, at page 267, 102 S.Ct., at page 174)). Thus, on remand,

the only issue before us is whether California law requires the application of the strictest standard of proof in this case even though such is not mandated by the federal Constitution.[1] We have re-examined our opinion and conclude that this state's law does not so require.

Defendants here contend that state constitutional and statutory law both favor the use of a stricter standard of proof than is required by the federal Constitution. It is correctly noted that the California Supreme Court has determined that section 2 of article I of the State Constitution[2] is "(a) protective

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1/ The Supreme Court denied the City Attorney's Petition for Certiorari in all respects except as to "question 2 ..., namely, whether a City, in a public nuisance abatement action brought against a motion picture theater, must prove beyond a reasonable doubt that the motion pictures at issue are obscene." (___ U.S., at p. ___ (70 L.Ed. 2d, at pp. 264-265, 102 S.Ct., at p. 172)).

2/ Article I, section 2(a) provides: "Every person may freely speak, write and publish his or her sentiments on all subjects, being

provision more definitive and inclusive than the First Amendment." (Wilson v. Superior Court (1975) 13 Cal.3d 652, 658; see also Robins v. Pruneyard Shopping Center (1979) 23 Cal.3d 899, 908-910, affd. (1980) 447 U.S. 74 (64 L.Ed.2d 741, 100 S.Ct. 2035)). However, this state's high court has never indicated that, in the civil regulation of obscenity, courts should adhere to more rigorous procedures than required by the federal Constitution. (See generally, People ex rel. Busch v. Projection Room Theater (1976) 17 Cal.3d 42, cert.den. sub nom., Van de Kamp v. Projection Room Theater, 429 U.S. 922 (50 L.Ed.2d 289, 97 S.Ct. 320)). Absent such a pronouncement, we see no reason to construe the California Constitution more broadly than the First Amendment on the burden of proof issue. (See People v.

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responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press."

Superior Court (Olson) (1979) 96 Cal.App. 3d 181, 195, cert.den. (1980) 446 U.S. 935 (64 L.Ed.2d 787, 100 S.Ct. 2152)).

Defendants also point out that the statutory definition of obscenity in this state (Pen.Code §311) is stricter than the United States Supreme Court's definition. (Bloom v. Municipal Court (1976) 16 Cal.3d 71, 77). This argument is not relevant to the issue before us, because the Legislature has not imposed a different standard of proof in civil obscenity cases.

In our opinion the problem of balancing the state's interest in controlling obscenity and the individual's constitutional right of free speech is sufficiently complex. We do not think the adoption of a different procedural rule with respect to the proof of obscenity under state law would either advance the cause of free speech or help control

obscenity. Therefore, since the Supreme Court has announced that the United States Constitution does not require proof beyond a reasonable doubt, we conclude that the proper standard of proof under both the state and federal Constitutions is the "clear and convincing evidence" standard.

As the Supreme Court stated in its opinion in this case (___ U.S., at p. ___ (70 L.Ed.2d, at p. 266, 102 S.Ct., at pp. 173-174)), it has on several occasions held that the "clear and convincing" standard or one of its variants is the appropriate standard of proof in a limited number of civil cases to protect particularly important interests. (See Addington v. Texas (1979) 441 U.S. 418, 431-433 (60 L.Ed.2d 323, 99 S.Ct. 1804) (civil commitment); Rosenbloom v. Metromedia (1971) 403 U.S. 29, 51-52 (29 L.Ed.2d 296, 91 S.Ct. 1811) (libel); Woodby

v. INS (1966) 385 U.S. 276, 285-286 (17 L.Ed.2d 362, 87 S.Ct. 482) (deportation); Chaunt v. United States (1960), 364 U.S. 350, 353 (5 L.Ed.2d 120, 81 S.Ct. 147) (denaturalization); Schneiderman v. United States (1943) 320 U.S. 118, 159 (87 L.Ed. 1796, 63 S.Ct. 1333) (denaturalization)). In our view such an interest is involved in this case. Thus, both the First Amendment to the United States Constitution and Article I, section 2, of the California Constitution require that obscenity be proved by clear and convincing evidence in a public nuisance abatement action.

The trial court in the present case thus erred in requiring the fact of obscenity to be proved beyond a reasonable doubt. Since the Court issued injunctions against only 11 of the 17 films complained of, the City Attorney may again seek to enjoin the remaining 6 films. The case

is remanded for further proceedings consistent with this opinion. Except for the section concerning standard of proof, we reiterate our earlier opinion (114 Cal.-App.3d 923) in its entirety.

CERTIFIED FOR PUBLICATION.

/s/ Morris
Acting P. J.

We concur:

/s/ McDaniel
J.

/s/ Gardner
J.

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*Retired Presiding Justice of the Court of Appeal sitting under assignment by the Chairperson of the Judicial Council.

APPENDIX B

(Reference: Petition at pg. 2, 21, 34, 36, 46, 51.)

Amended Memorandum of Opinion of Trial Judge Marvin Weeks on the issues of:

1. Constructive Trust;
2. Revocation of Defendants' Business License;
3. Closure of Defendants' Theater; filed June 6, 1978.

.....B-1 thru B-161

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ORANGE

PEOPLE OF THE STATE OF CALIFORNIA ex rel. KEITH GOW, City Attorney of the City of Santa Ana, California, Plaintiff, vs. MITCHELL BROTHERS' SANTA ANA THEATRE, etc., et al., Defendants.	CASE NO. 25-65-30 AMENDED MEMORANDUM OF OPINION ON THE ISSUES OF: 1. Constructive Trust 2. Revocation of Defendant's Business License 3. Closure of Defendants' Theatre

FILED
June 6, 1978
WILLIAM E. ST JOHN, County Clerk
By _____ Deputy

This action came on regularly for trial on the 11th day of October, 1977, in Department 1 Extra Sessions sitting in Departments 18, 37, and 40 of the above-entitled court, the Honorable MARVIN G. WEEKS, Judge Assigned, presiding, the plaintiff appearing by attorney JAMES J. CLANCY, and the defendants appearing by attorney JOSEPH RHINE, and the Court on October 17, 1977, having ordered a jury trial on the issues of

"obscenity", "public nuisance", and "damages", to precede determination of the equitable issues of "imposition of a constructive trust on defendants' box office receipts," revocation of defendants' business licenses and permits, and closure of defendants' theatre; and a jury of 12 persons having been regularly impaneled and sworn to try the issues of "obscenity", "public nuisance", and "damages", and having heretofore returned its verdicts on said issues as more particularly set forth in the "Judgment on Verdicts in Open Court", a copy of which is attached hereto, marked EXHIBIT "A", and incorporated herein by reference; thereafter on January 4th and 5th, 1978, the Court heard and considered oral arguments by both counsel on the equitable issues of "Imposition of a constructive trust on defendants' box office receipts", "Revocation of defendants' business licenses and permits,"

and "Closure of defendants' theatre." The Court also reread and considered applicable portions of plaintiff's and defendants' Trial Briefs pertaining to these issues; and the Court having granted leave to both counsel to submit written arguments and supplemental points and authorities on the issues; and the Court having received, read, and considered said written arguments, and points and authorities, and the matter having been duly submitted to the Court for its decision now renders its Memorandum of Opinion as follows:

BACKGROUND

In late 1975, the defendants took over the United Artist Theatre at 1565 West Seventeenth Street in the City of Santa Ana, California, located in a modern shopping center known as "Honer Plaza". Honer Plaza is located on the northwest corner of Bristol Street on the East, and Seventeenth

Street to the South. The theatre is the westerly-most structure of the shopping center, and is a single standing structure. Immediately to the west are a number of Government buildings, County and/or State. To the east is a bank, a supermarket, a major drug store, one or two major department stores, and a host of other smaller shops. To the South, directly in front of the theatre and running parallel to Seventeenth Street westerly from Bristol Street, is the Santa Ana College. West of the college is a church and kindergarten school. West of the government buildings, and north of the theatre, is residential. Prior to defendants' operation of the theatre, it featured family-type "G" and "PG" rated films. In late 19[illegible], defendants converted the theatre to an "Adult" theatre, specializing in sexually explicit films, and continues to operate it as such. In November,

1975, the City of Santa Ana hired James J. Clancy, counsel herein, to draft and submit a City Ordinance declaring the "commercial exploitation of patently offensive sexual conduct in lewd films, and theatres exhibiting the same, to be a public nuisance, and ordering their abatement." On January 5, 1976, the City of Santa Ana passed and adopted such an Ordinance. (Santa Ana Ordinance N.S. 1287, a copy of which is attached hereto as EXHIBIT "B") Between November 1975 and adoption of the Ordinance, plaintiff's counsel herein conducted sub rosa surveillance at the theatre to gather evidence to be presented to the Santa Ana City Council relative to the provisions of the proposed Ordinance. During this time, the case of People ex rel. BUSCH vs Projection Room Theatre 17 Cal 3d 42 which provided the legal basis of this case, was pending in the California Supreme Court,

and was finally decided in June or July of 1976. It should be noted that City Ordinance N.S. 1287 was identical to City of Duarte Ordinance 369 with which plaintiff's counsel herein was also involved, and that the Duarte ordinance was the subject of litigation pending in the Appellate Courts in People ex rel. William Camil vs Buena Vista Cinema 57 Cal App 3d 497, until April 1976 when that case was decided.

After the "Camil" case, supra, was decided, the City of Santa Ana passed and adopted Ordinance No. 1325 (a copy of which is attached hereto as EXHIBIT "C") on October 26, 1976, to amend Ordinance No. 1287, in an effort to avoid the fate of the Duarte Ordinance decided by the Court in "Camil", supra. Thereafter, on October 26, 1976, the Santa Ana City Council passed and adopted Resolution No. 76-134 (a copy of which is attached hereto as EXHIBIT "D")

pursuant to its Ordinance No. 1287 and 1325, wherein it resolved that:

> "the real property and activity known as the Mitchell Brothers' Santa Ana Theatre, located at 1565 West 17th Street, Santa Ana, California, is in violation of Ordinance No. 1325 of the City of Santa Ana," and "declaring such activity to be a public nuisance, revoking all licenses and permits, and ordering abatement," and "ordering the City Attorney to take all steps necessary to comply with Section 12-105 of the Santa Ana Municipal Code."

On November 2, 1976, and pursuant to the alleged authority of the above ordinances and resolution, the City Attorney for the City of Santa Ana, and on behalf of the

City, filed the within action. As previously recited hereinabove, the jury has heretofore rendered its verdicts on the issues of "public nuisance" and "damages", leaving for the Court a determination of the following issues:

I

WHETHER OR NOT A CONSTRUCTIVE TRUST SHOULD BE IMPOSED IN FAVOR OF PLAINTIFF ON THE BOX OFFICE RECEIPTS OF DEFENDANTS' MITCHELL BROTHERS' SANTA ANA THEATRE FOR THE PERIOD SEPTEMBER 3, 1975 TO APRIL 12, 1977?

Between September 3, 1975 and April 12, 1977, and except for a few days unaccounted for, which is of no significance here, defendants' gross box office receipts at its Mitchell Brothers' Santa Ana Theater totaled $667,289.87 (Plaintiff's Exhibits 110A-Z).

It is these receipts that plaintiff contends is the res of a constructive trust which the Court should impose, with plaintiff as the beneficiary. Defendants did not see fit to offer any evidence of operating costs during this period, therefore, the above figure will be used for the purpose of this part of this Opinion.

The plaintiff's theory is that, under general equity principles, the monies received as box office receipts from the exhibition of hardcore pornography should be impressed with a constructive trust for the benefit of the people who allegedly have been harmed by the alleged unlawful activity. In passing, and without belaboring the point, it appears the plaintiff herein, the City Attorney of the City of Santa Ana, has standing by virtue of Civil Code Section 731, to bring the action of public nuisance against defendants and to

assert therein the remedy of constructive trust. Plaintiff relies on the concept of unjust enrichment as the basis for imposing a constructive trust in this case, and cites Beck vs West Coast Life Insurance Co. 38 Cal. 2d 643, where a named beneficiary murdered the insured, and the cases where one joint tenant murders the other, citing Abby vs Lord 168 Cal.App.2d 499, and Johansen vs Pelton 8 Cal.App.3d 625. It should be noted here that plaintiff's position on this issue, which he presented orally on the dates mentioned herein, is contained on pages 86 through 96, inclusive, of his Trial Brief. Among the arguments of plaintiff is that defendants should not be allowed to gain from their alleged illegal activity between the time the action was filed and the date the case finally got to trial.

In addition to defendants' oral

argument against imposition of a constructive trust on the box office receipts, their Trial Brief addresses the issue at pages 14 through 16, and rely in part on the case of People vs. Superior Court (Jayhill Corp) (1972) 23 Cal.App.3d 85, 100 Cal.Rptr. 38, where the Appellate Court determined that the Attorney General did not have standing to seek restitution from defrauded customers of defendants. The judicial history of that case is, that a hearing was granted by the California Supreme Court, which decided the case on April 5, 1973 by issuing a Writ of Mandate setting aside the Order below, and held in effect that in an action brought by the Attorney General under Business and Professions Code Section 17535, even as it read then, a court of equity could grant ancillary relief and order defendants to make restitution to the customers (9 Cal.3d

283). In 1972 the Legislature amended Business and Professions Code Section 17535 to expressly provide for such relief. It would therefore appear that defendants' bold statement at line 23-25, page 14, of their Trial Brief that "plaintiff's whole argument concerning his constructive trust is destroyed by the Jayhill Corp case", supra, is ill-founded reliance on what appears to be an overturned decision.

In reviewing the applicable statutes on constructive trusts, it is found that Civil Code Section 2223 reads as follows:

> "INVOLUNTARY TRUSTEE, WHO IS. One who wrongfully detains a thing is an involuntary trustee thereof, for the benefit of the owner."

Civil Code Section 2224 reads as follows:

> "INVOLUNTARY TRUST RESULTING FROM NEGLIGENCE, ETC. One who gains a thing by fraud, accident,

mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained for the benefit of the person who would otherwise have had it."

Civil Code Section 3517 reads as follows:

"No one can take advantage of his own wrong."

A constructive trust is a remedy used by a court of equity to compel a person who has property to which he is not justly entitled to transfer it to the person entitled thereto. Witkins Summary of California Law 8th Edition, page 5487, Section 131. A constructive trust will be imposed where a person obtains property by fraudulent representation, Walter H. Leimert Co vs Woodson 125 Cal.App.2d 186; where

property is taken by mistake, First National Bank vs Wakefield 148 Cal. 558; where property is obtained by violation of some fiduciary or beneficial relationship, Cardoza vs Bank of America 116 Cal.App.2d 833; Gerhardt vs Weiss 247 Cal.App.2d 114, Lucas vs Associacao etc 61 Cal.App.2d 344.

In this case, the jury has expressly found by its verdict on exemplary damages that defendants were "not guilty of . . . fraud," and based on the evidence this Court accepts the jury's finding on this issue, and therefore it appears that fraud does not constitute a basis for imposition of a constructive trust herein. Based on the evidence, it also appears that defendants are not guilty of negligence, accident, mistake, undue influence or violation of any trust that would be applicable here, and therefore no constructive trust can be imposed on the basis of any of these factors.

The only possible basis for imposition of a constructive trust would be if defendants were guilty of some "wrongful act" as that phrase is used in the statute. The cases interpreting this phrase appear to construe "wrongful act" as crime, and would seem to be a factor considered in the insurance cases, such as Beck supra and the joint tenancy cases, such as Abbey supra.

In this case the only "wrongful act" by defendants that could be asserted by plaintiffs is the showing of sexually explicit film, some of which were later determined by a jury to be obscene and therefore constituted public nuisances.

While the same acts alleged and proved here might constitute a violation of Penal Code Section 311 in a Criminal proceeding, the fact remains that defendants have not sustained a criminal conviction in this case, and, thus, the question is: does the

maintenance of a public nuisance by the showing of obscene film constitute such a "wrongful act" as contemplated by the statute, so as to justify the imposition of a constructive trust? I think not. In reviewing the cases where a constructive trust was imposed as a result of a "wrongful" or "criminal" act, it appears that in each case there was some underlying instrument that would have taken effect, EXCEPT for the imposition of a constructive trust, that was not within the contemplation of the parties to the instrument. In the Beck case, supra, an insurance policy; in the Abbey case, supra, a joint tenancy deed. There is no such instrument in this case.

Another problem is that plaintiff is not seeking restitution by way of imposition of a constructive trust on behalf of defendants' paying customers, but on its own behalf. Plaintiff produced no

disgruntled customers of defendants, complaining about not getting their money's worth. On the other hand, defendants produced a regular customer of the theatre, a Mr. Gilbert, whose testimony indicated that at least he was more than satisfied with the film shown by defendants. Therefore, assuming for the sake of analysis that there is some basis for a constructive trust, is plaintiff the proper beneficiary in his own right? I think not. In the language of the Code, defendant "... is, unless he has some other and better right thereto, an involuntary trustee of the thing gained for the benefit of the person who would otherwise have had it." This conclusion is consistent with one of the holdings in People vs Superior Court (Jayhill Corp) 9 Cal.3d 283. While it is recognized that the Jayhill case, supra, was decided in part under Business and

Professions Code Section 17535, the Court said at page 286 "In particular in an action by the Attorney General under Section 17535, a trial court has the inherent power to order, as a form of ancillary relief that the defendants make or offer to make restitution to the customers found to have been defrauded." Plaintiff, in reliance on language quoted on page 89 of this Trial Brief from the Beck case, supra, asserts that the inquiry is not limited to the question of "who is the person who would otherwise have had it?" but includes the broader question of "who is the injured party?" In analyzing the insurance cases, we see that the so-called "injured party" is the estate of the deceased victim, or an alternative beneficiary, and in the joint-tenancy cases, it is a relative of the deceased joint tenant. It would appear to me to be a giant stretch of legal theory to

bring plaintiff into the realm of "injured party" in this case.

The Court has found no case in this State where a constructive trust has been imposed on box office receipts of a theatre for the showing of obscenity. State ex rel Ewing vs "Without A Stitch" 307 N.E.2d 911, is an Ohio case, cited by both plaintiff and defendants in their respective Trial Briefs. It should be noted that plaintiff's counsel herein was one of appellee's counsel in the Ohio case. This Ohio case addresses itself inter alia to a rather shakey and unclear "forfeiture" issue involving box office receipts. At the outset it is to be noted that Ohio, unlike California, has a civil statutory scheme for controlling or attempting to control the showing of obscene motion picture film. This is contained in Ohio statutes R.C. 3767.01 et seq. Plaintiffs (appellees) filed a complaint in

which they demanded inter alia, forfeiture of all receipts derived from the exhibition of "Without A Stitch". The trial court reserved a decision on this issue pending the outcome of appellate review of its finding on obscenity. The Appellate Court ordered the appellants to account and pay to the County Treasurer the receipts obtained from showing "Without A Stitch" after the date on which the trial court's permanent injunction would have become effective had the Judge not stayed it. It appears that under the Ohio statute, the trial judge had no power to stay the injunction. The Ohio Supreme Court construed the action of the Appellate Court as an effort to rectify the error of the trial court in staying the injunction and, therefore, upheld the Appellate Court's "pay over order" of net receipts, for showing "Without A Stitch" after the date when the

injunction should have gone into effect. It must be pointed out here that this limited order was only for net receipts received for showing the film after a finding of obscenity. Of course, here plaintiff seeks to impose a constructive trust for the showing of film going back two years before a finding of obscenity.

While plaintiffs in the Ohio case demanded forfeiture of box office receipts in their complaint, it was pointed out by the Ohio Supreme Court that R.C. 3767.01 et. seq. did not provide for forfeiture, and that the trial court should have dismissed that portion of the complaint. This limited holding by the Ohio Supreme Court does not support the broad assertions of plaintiff herein. Another factor for consideration on this issue is that the jury, after due deliberation, awarded plaintiff compensatory damages in the sum of $76,400.00. It would

appear that to now forfeit or impose a constructive trust, even on the box office receipts of those eleven film found to be obscene by the jury, would smack of double recovery for the same wrong.

Finally, it is to be noted that there is no evidence before the Court that defendants have exhibited any of the eleven motion pictures found to be obscene by the jury since return of the verdicts on December 6 and 7, 1977.

Based on all the above, the evidence in the case, and the totality of the circumstances, the Court denies the plaintiff's prayer, motion, and request for imposition of a constructive trust on the box office receipts of defendants Mitchell Brothers' Santa Ana Theatre from November 7, 1975 to April 12, 1977.

II

WHETHER OR NOT PLAINTIFF IS ENTITLED TO AN ORDER RATIFYING THE ACTION OF THE SANTA ANA CITY COUNCIL BY ITS RESOLUTION NO. 76-134, REVOKING ALL LICENSES AND PERMITS ISSUED BY THE CITY TO THE DEFENDANTS?

In discussing this issue, and the next, it would appear appropriate at this point to quote from Flack vs. Municipal Court 66 Cal.2d 981 footnote (15)

> "But obscenity is not a problem related exclusively to this modern generation. A century and a half ago Thomas Jefferson also deplored obscenity and its corrupting effect upon society, but reached a somewhat different conclusion: 'I deplore . . . the putrid state into which our newspapers have passed, and the malignity, the vulgarity, and the mendacious

spirit of those who write them . . . These ordures are rapidly depraving the public taste. It is, however, an evil for which there is no remedy: our liberty depends on the freedom of the press and that cannot be limited without being lost.' (See Knovitz, Bill of Rights Reader (1954) p. 412.)"

In this case we are not dealing with newspapers, or any other segment of the honorable and professional news media: what the Court is dealing with is obscenity, hard-core pornography, or as it is sometimes referred to by a more palatable name "sexually explicit material", and more specifically in this case, obscene motion picture film. With respect to the exhibition of sexually explicit motion picture film, the words of Thomas Jefferson are as equally applicable today as they were to newspapers a hundred and fifty years ago, because the United States Supreme Court has ruled "that expression by means of motion pictures is

included within the free speech and free press guaranty of the First and Fourteenth Amendments." Freedman vs Maryland 380 U.S. 51. As a broad basic principle, we also know that a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license without narrow, objective, and definite standards to guide the licensing authority is unconstitutional. Shuttlesworth vs. Birmingham 394 U.S. 147. So it is against this backdrop of Constitutional guarantees that the action of the City Council revoking defendants' licenses and permits in this case must be viewed.

At the outset, the Court points out that on December 12, 1977, it ruled as unconstitutional at least a part of Ordinance N.S. 1287 and N.S. 1325, as well as at least parts of Resolution No. 76-134. This arose through the efforts of plaintiff's counsel to introduce the ordinances and

resolution as evidence before the jury in an effort to prove malice on the part of defendants to-wit: that defendants continued to show sexually explicit motion pictures already found by the City Council to be "lewd". (It is interesting to note that the ordinance definition of "lewd" is essentially the definition that counsel for plaintiff has asserted throughout this case, is the definition of "obscenity" promulgated by Miller vs California 413 U.S. 15, and incorporated into Penal Code Section 311 by reference. (See plaintiff's proposed jury instruction 16.)

At the time of its December 12, 1977 ruling, the Court was concerned primarily with Section 12-103, Subsection (c) of Ordinance No. N.S. 1287, and Section 12-104 (c) of Ordninance No. N.S. 1325. (EXHIBITS "B" and "C"). In comparing these two provisions, it is readily apparent that while

the language in N.S. 1325 Section 12-104(c) has been changed from the prior ordinance, the intent and effect is the same; to-wit: A legislative adjudication of obscenity by the City Council. A quick look at Section 2, Subsections A and B, and Section 3, Subsection A, of Resolution No. 76-134 (EXHIBIT "D") reveals that the City Council did just that. In its December 12, 1977 ruling, the Court was also concerned with Section 12-103 Subsection (D) of N.S. 1287, and Section 12-104, Subsection (E) of N.S. 1325. It is clear, from reading these two sections, that the sole thrust of the provisions is to "summarily abate" the showing of film by defendants, which the Council would have previously determined was obscene, and to require a "voluntary" surrender of said film. Referring to Section 6, Subsection B, of Resolution No. 76-134, we see that the Council did in fact order

summary abatement.

Also of concern to the Court in its December 12, 1977, ruling was Section 12-103, Subsection (F)(3) of N.S. 1287, and Section 12-104, Subsection (G)(3) of N.S. 1325, both of which undertakes to declare motion picture film contraband and subject to forfeiture upon a determination by the Council. Referring to Section 7, Subsection B, of Resolution 76-134, we note that the City Council did, in fact, order 26 films and previews it determined obscene to be considered as contraband and forfeited. In this Court's opinion, one does not have to be a Constitutional scholar, or a legal giant, to reach the conclusions that these Ordinance provisions, and the Council's action taken pursuant thereto, are constitutionally prohibited "prior restraints" and "censorship" of the first water. The Court need look no further than the Camil case, supra, handled by plaintiff's counsel

herein, to find legal support for this conclusion. At page 502 of the Camil case, supra, Justice Compton stated:

> "The first and foremost requirement is a judicial determination, prior to abatement, of the obscene character of the films under prevailing law. Patently the City Council could not by ordinance, adopt its own definition of obscenity, and even the most formal administrative proceeding to determine the issue of obscenity under prevailing law could not suffice as a substitute for a judicial determination. Further, the Council's Resolution that particular films were obscene would not be binding on the Court in any abatement proceeding instituted thereafter."

Based on the above acts, circumstances, and law, the Court herein on December 12, 1977, determined that the referred to sections were unconstitutional, and refused to allow

plaintiff to present this evidence to the jury.

In that ruling the Court, however, did not specifically consider the license revocation provisions of Section 12-104, Subsection (D) of N.S. 1325 and Section 4 of Resolution No. 76-134 (The Court notes that N.S. 1287 contains no license revocation provisions) and will now undertake to do so. The relief sought by plaintiff re: the licenses and permits, as stated in the prayer of the first amended and supplemental complaint is:

> "That the action taken by the City Council of Santa Ana in Resolution 76-134 dated October 26, 1976, revoking all licenses and permits issued as a part of the operation of Mitchell Brothers' Santa Ana Theatre be confirmed and approved as a valid revocation of said licenses, such revocation to be effective from October

26, 1976; . . ."

No evidence was introduced by plaintiff as to the type of license or permits involved, when they were issued, the purpose of the license, when they expired, whether they were "taxing license", or "regulatory licenses", nor were copies of the licenses, or evidence of the City's licenses ordinance presented to the Court.

Independent research by the Court of the Santa Ana Municipal Code reveals that Chapter 12, Article III, deals with "Lewd Films and Theatres Exhibiting Lewd Films," and is a codification of Ordinances N.S. 1287 and N.S. 1325, which has previously been discussed herein, and which contains no provisions for the issuance of licenses or permits, but only provisions for revocation; that Chapter 21 deals with License in General, including purpose, and provisions for issuance, enforcement, penalties

and appeal. In the absence of any evidence as to the types of licenses and/or permits here involved, particularly the lack of any evidence that said licenses and/or permits were issued to defendants under some authority other than Chapter 21 of the Santa Ana Municipal Code, it must be presumed that any license or permit issued to defendants was pursuant to Chapter 21 of the Santa Ana Municipal Code. Section 21-1 of Article I reads as follows:

> "The purpose of this Chapter is to provide a revenue for the general operation of the City by the levy of a license tax on all business transactions or activities carried on or occuring within the City and is not intended for regulation. . ."

While on its face it appears quite clear that any license or permit issued under this Chapter is for revenue purposes only, as

opposed to regulation. We know, however, that this expression of purpose is not conclusive, but in considering the provisions of each Section within this Chapter, one can only conclude that the stated purpose, accurately described the operative sections of the Chapter, and thus it would appear that this is a license ordinance for the sole purpose of raising revenue. This conclusion is further supported by a comparison with Chapter 22 pertaining to Massage establishments which is clearly regulatory in nature, or both regulatory and revenue raising. We also find in Chapter 12, the Chapter specifically addressing itself to "Lewd Films and Theatres Exhibiting Lewd Films" in Article III; that Article II addresses itself to "Peep Show Establishments" and is replete with regulatory provisions, pertaining to walls, aisles, doorways, exit signs, lighting, etc. Nothing regulatory

is found in Article III, relating to the issuance or revocation of a license or permit, except that the showing of an obscene film constitutes a public nuisance. Nothing in N.S. 1287 or N.S. 1325 purports to amend Chapter 21, nor has this been argued. Nor has it been argued or asserted that defendants failed to pay the tax as required by Chapter 21. So what we have is the City attempting to revoke a revenue raising license on the basis of an alleged violation of a regulatory ordinance under which no license was issued, adopted October 26, 1976. There is no question in the Court's mind that the City has the power and authority under Business and Professions Code Section 16000 et. seq. to issue license for the purpose of regulating theatres such as defendants' as an exercise of its constitutionally granted police power. It is also apparent to the Court that at the time of

adopting Chapter 21, the Honorable City Council had not anticipated nor foreseen the invasion of its fair City by entrepreneurs bent on exhibiting pornographic and obscene motion picture film. Hence, while it appeared at the outset that we were dealing with a regulatory license scheme for the licensing of motion pictures, the above analysis reveals that we are only dealing with a revenue license; therefore, the first blush issues of "prior restraint" and early access to the courts, which would have raised the application of Freedman vs. Maryland 380 U.S. 51; Bantam Books Inc. vs. Sullivan 372 U.S. 58; Southeastern Promotions vs. Conrad 420 U.S. 546; and O'Brien vs. U.S. 391 U.S. 367, on the Constitutional issue does not rise to the fore as determinative of the Council's action. What does appear determinative on analysis; however, is a real effective date of ordinance N.S.

1325. Section 7 of the ordinance purports to be an urgency clause and reads as follows:

"SECTION 7: URGENCY CLAUSE.

Pursuant to provisions of Subsection (b) of section 36937 of the Government Code of the State of California, this Ordinance is for the immediate preservation of the public peace, health, and safety and shall take effect immediately. The facts constituting the urgency are as follows:

> The purpose of this Ordinance, as is evident from its content, is to enable the City of Santa Ana to abate the type of public nuisance being committed within the City. The City Council deems the showing of lewd films, as defined herein, as being a public nuisance contrary to the public peace, health and safety of the City and its residents. This Ordinance makes certain changes in previously adopted and effective Ordinance NS-1287 required by the decision of the California Court of Appeal in People ex rel. Camil v. Buena Vista Cinema, 129 Cal.Rptr. 315. The City Council deems it

necessary for the immediate preservation of the public peace, health and safety that immediate action be taken to abate said public nuisance pursuant to the terms of this Ordinance.

Adopted this 4th day of October, 1976, by the following vote:

AYES, COUNCILMEN: Yamamoto, Bricken, Ortiz, Garthe, Evans Brandt, Ward

NOES, COUNCILMEN: None

ABSENT, COUNCILMEN: None

/s/ John Garthe
MAYOR

Thereafter on October 26, 1976, the ordinance was purportedly adopted as a regular ordinance. The question then is did the ordinance become effective on October 4, 1976 as an emergency ordinance or thirty days thereafter as a regular ordinance, or did it become effective on October 26, 1976, or thirty days thereafter as a regular ordinance?

California Government Code Section

36937(b) provides that an ordinance becomes effective thirty days after passage unless passed as an emergency statute. To be effective immediately, if it is an ordinance, (it must be passed):

> "(b) For the immediate preservation of the public peace or safety containing a declaration of facts constituting the urgency and is passed by four fifths vote of the city council." Govt. Code Sec. 36937(b)

To be effective immediately the urgency clause of an ordinance by definition must state relevant and persuasive facts necessitating the legislative action for the immediate preservation of public peace, health or safety. Parr v. Carmel (1971), 3 Cal.3d 861. (In Parr the ordinance was struck down on constitutional grounds).

In Morgan v. City of Long Beach (1922), 57 Cal.App. 134, the Court observed that in

the absence of facts showing urgency, the mere declaration of a city council so declaring in an ordinance will not render it immediately operative. The rationale underlying the statutory requirement that facts be stated showing the necessity for immediate enactment is not intended to prove the city council was right but rather to demonstrate that the ordinance was conceived in atmosphere of proper legislative deliberation. Where such recital is made mandatory by statute the mere declaration of the emergency without more does not render the ordinance operative immediately. McQuillan, Municipal Corporations (3d Ed.) Vol. 5, Sec. 15.40, 124.

Section 7 of Ordinance N.S. 1325 fails to state a single fact on which the City Council rests its determination that the adoption of the ordinance as an urgency measure was necessary to preserve the

public peace, health or safety. On the other hand, there are several factors mitigating against the urgency clause. (1) Plaintiff had been conducting sub rosa surveillance of defendant's theatre since late 1971; (2) The City Council enacted Ordinance N.S. 1287 on February 18, 1976, with full knowledge of defendant's business but did not include an emergency clause, nor even a license suspension or revocation clause, and; (3) While Section 7 of N.S. 1325 refers to the Camil case, the fact is Camil was decided in April, 1976 or some six months before the ordinance.

Where an emergency clause is inserted in an ordinance for the purpose of having it take immediate effect and the facts were not sufficiently stated to give it such immediate effect, the effective date of the ordinance is postponed and the operative effect is delayed for thirty days. Morgan

v. City of Long Beach, supra, 139.

Based on the above, the Court is of the opinion that Ordinance N.S. 1325 did not become effective on October 4, 1976 but thirty days thereafter and the action of the council on October 26, 1976 purportedly adopting N.S. 1325 as a regular ordinance was an idle and an ineffective act. We then look to the Resolution adopted on October 26, 1976 to find what facts were before the Council on that date to justify the revocation and find only alleged acts occurring prior to the effective date of the Ordinance.

It is the opinion of the Court that, due to the defects in the Ordinances as pointed out, and the absence of conduct occurring after the effective date of the Ordinance to justify revocation, the Court cannot approve the revocation, and, therefore, plaintiff's prayer, request and motion

for an order that the action taken by the City Council of Santa Ana in Resolution 76-134 dated October 26, 1976, revoking all licenses and permits issued as a part of the operation of Mitchell Brothers' Santa Ana Theatre, be confirmed and approved as a valid revocation of said licenses effective October 26, 1976, is denied. Nothing herein is to be construed as a determination of the constitutionality of Section 12-104 Subsection (D) of N.S. 1325. Further, nothing herein is to be construed as preventing plaintiff from taking further legislative action on the defendants' license, and/or permits. The determination herein is based on the procedural and operative facts presented and discussed.

III

WHETHER OR NOT A TEMPORARY CLOSURE OF DEFENDANTS' MITCHELL BROTHERS' SANTA ANA THEATRE BY WAY OF INJUNCTION IS CONSTITUTIONALLY PERMISSIBLE AS A MEANS OF ABATING A PUBLIC NUISANCE?

At the outset, it is to be noted that the prayer in paragraph 3d of plaintiff's first amended complaint, which seeks closure of defendants' theatre for a period of one year, was stricken by Judge Rutter on defendants' motion on August 16, 1977.

While a prayer is important for a number of reasons (see Witkins California Procedure 2d Edition; pleading Section 374 page 2039) it is generally recognized that in a contested case relief may be had, even in the absence of a prayer. Berg vs Investors Real Estate Loan Co. 207 Cal. App.2d 808. Code of Civil Procedure

Section 580 provides in part that, in contested cases ". . . (T)he Court may grant him any relief consistent with the case made by the complaint and embraced within the issue." There can be no mistake about this being a contested case, and closure of defendants' theatre is consistent with the complaint, and within the issue, provided it is constitutionally permissble; therefore, in determining this issue, this Court is going to consider itself not bound by the fact that the prayer for closure of the theatre has been stricken.

In approaching the constitutional issue arising from a Court closing a theatre and with it the exhibition of all motion picture film, it is noted that plaintiff's Trial Brief, pages 104 through 108, sets forth the position of plaintiff, while defendants' original Trial Brief at page 17 treats the issue as finally disposed of by

Judge Rutter's order of August 16, 1977, striking the closure request from the prayer. However, in defendants' Supplemental Points and Authorities filed January 27, 1978, they address the issue and rely on People ex rel. Busch vs Projection Room 17 Cal.3rd 42, to be discussed further hereinbelow.

For years, Courts in this country, including the United States Supreme Court, have struggled with the problem of obscenity because of its intertwined nature with the guaranties of the First Amendment rights of freedom of speech and expression. In this State there are no State Civil Statutes controlling the exhibition of obscene motion pictures, and Criminal Statutes appear to have been inadequate because the availability, dissemination, and exhibition of obscene material has apparently been on the rise for the last seven or eight years. This is evident by the testimony of defendant James Mitchell in this

case, that he expects film like "Behind the Green Door", found by the jury herein to be obscene, to be on television within the near future. Admirable efforts by City officials, such as here and in Duarte, in response to demands by the constituency to control obscenity, is more often than not zapped by the Courts because the Courts themselves are hamstrung by the Constitutional protections enjoyed by the promoters of obscenity and must conscientiously apply the law as it is, although it is weighted in favor of such promoters. While it has been held that "obscenity", in whatever form, is not within the area of Constitutionally protected speech or press, Kirby vs Municipal Court 237 Cal.App.2d 335, Roth vs United States 354 U.S. 476, Miller vs California 413 U.S. 15, and that commercial exposure and sale of obscene materials to anyone, including consenting adults, is not

constitutionally protected and is subject to State regulation, Kaplan vs California 413 U.S. 115; nevertheless, a State must, in adopting procedures for dealing with obscenity, be extremely careful of the possible restraint of constitutionally protected speech, Flack vs. Municipal Court 66 Cal.2d 981. It has also been held "that obscenity is often separated from Constitutionally protected expression only by a dim and uncertain line, and purported obscenity maintains, until such time as it is judicially determined to be unprotected speech, the same preferred position as does free speech generally . . . . "People vs Superior Court 28 Cal.App.3d 600.

A Court considering the closure of a theatre as in this case is faced with decisions dealing with prior restraint such as Freedman, Bantam Books, and Southeastern Promotions, supra, because, by closing down

a theatre a defendant may be restrained from showing Constitutionally protected film. In Southeastern Promotions, supra, at page 459, the Court said "Any system of prior restraint however comes to this Court bearing a heavy presumption against its Constitutional validity." (Citing Cases)

The evidence upon which the Court is called to make its decision on the issue of closure by injunction is essentially as follows:

Between September 3, 1975, and April 12, 1977 (the dates in issue in this case), defendants exhibited at its theatre described herein, approximately 41, full-length, sexually explicit movie film. This does not include previews of coming attractions, which were also sexually explicit. Of these 41 films the jury actually viewed 17. Of the remaining 24, plaintiff was unable to obtain the film, or saw fit not to,

and defendants, although volunterring to produce 12 of the 17 shown (the other 5 were pursuant to Court order) decided not to voluntarily produce the balance, and for reasons not here relevant the Court did not require them to do so. Although the plaintiff dilligently attempted to prove obscenity of the remaining 24 by way of "time and motion" studies, the Court, for reasons here not relevant, did not allow the "time and motion" studies, to go to the jury on the issue of obscenity, although it did allow them to go to the jury on the issue of damages in this bifurcated trial. The Court, however, personally viewed the 17 film, as well as the 24 "time and motion" studies, and while the Court does not now rule on the obscene nature of the 24 film portrayed in the "time and motion" studies, it does consider the totality of the evidence and circumstances, in reaching its

decision herein.

The jury after due deliberation found 11 of the 17 film viewed obscene, as more particularly set forth in the jury verdicts attached hereto as EXHIBIT "A" by "proof beyond a reasonable doubt." It found 4 of the movies not obscene and could not decide on 2 others. All the film found obscene by the jury exhibited the basest type of obscenity as it is generally thought of by the average, decent, moral person, as well as obscenity as defined by law, dominated by oral copulation, sodomy, masturbation, homosexualism, lesbianism, group sex, portrayed incest, and portrayed rape, the licking of sperm from the bodies of the actors, the smearing of sperm on the face. There were, however, no animals involved, and no violence. In one picture, an adult actress was portrayed as a child, but generally speaking, no children were involved.

As to the 24 "time and motion" studies, it would be a restrained description to call them "sexually explicit".

The jury found that the showing of these 11 obscene film constituted public nuisances for 9 periods of time, spanning approximately 382 days between September 3, 1975 and April 12, 1977, with close to 100 days of such activity occurring after plaintiff had filed and served its complaint herein.

During the course of the obscenity phase of the trial, plaintiff called as an expert witness Dr. Melvin Anchell, a recognized expert on the subject of obscenity and pornography, who testified in essence that the exhibition of sexually explicit film was harmful, generally. During the damages phase, plaintiff called another recognized expert, Dr. Ernest Van den Haag, who testified in substance that showing of

sexually explicit movies at defendants' theatre herein was harmful to the community. On the other hand, defendants called three expert witnesses on the obscenity phase of the trial, Dr. Robert Ernest McIlvenna, Dr. Marguerite Rubenstein, and Dr. Maurice Spottswood, who testified in essence that the viewing of sexually explicit film was not harmful, and might even be beneficial. In considering the conflicting testimony of these experts, this Court accepts the testimony of Dr. Anchell and Dr. Van den Haag, and rejects the testimony of defendants' experts in considering this phase of the case. It is important to note that Dr. Van den Haag specifically testified that sexually explicit or obscene film was particularly harmful to persons under the age of 24, because their sexual views had not yet matured. This is particularly relevant here, because, as pointed out previously,

defendants' theatre is directly across the street from the Santa Ana College, where it would be fair to guess that a large portion of the students are under 24. In addition, as pointed out, there is also a church and a kindergarten across the street and slightly to the west of defendants' theatre. Defendants advertise their "Adult" movies on a large marquee in the parking lot across from the college.

It is clear from the evidence in this case that defendants are engaged in the commercial exploitation of obscene motion picture film. Illustrative of this fact is that defendants grossed from this theatre alone $667,289.87 during the period September 3, 1975 to April 12, 1977. Defendants are not to be condemned for their business acumen; however, that is not in issue here. What is in issue is the fact that, while commercial activity is not

denied constitutional protection of free speech and press, it does not enjoy the same freedoms as matters of political, social, economic, educational, and religious importance to which the Constitutional guaranty of freedom of speech primarily relate. Hirsch vs San Francisco 143 CA 2d 313; Miller vs California, supra.

And, thus, the Court now comes to a further discussion of the Busch case, supra, cited hereinabove, and, rather than paraphrase, will quote herein verbatim the applicable, and what the Court considers the controlling part, of that case on the issue of closing the defendants' theatre. At page 58, Justice Richardson stated:

> "In the cases at bench, in addition to relief under the Red Light Abatement Act (Pen. Code, Section 11225 et seq.), [1] plaintiffs seek a preliminary

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[1] As we explain infra, this enactment is inapplicable to any of the cases before us. (Explanation of Footnote: The Busch case determined that Penal Code Section 11225 et seq. was not applicable to obscene film.)

injunction enjoining and restraining defendants from conducting and maintaining said premises hereinabove described . . . for the purposes of lewdness and from permitting such acts to take place therein and thereon . . . (and further pray that they) be perpetually enjoined from operating and conducting said premises as a public nuisance.' Both in their briefs and at oral argument plaintiffs have made abundantly clear that, as the prayers of their complaints state, the relief they seek is the abatement and closing down of movie theatres and bookstores exhibiting and selling films and magazines determined to be obscene. Although we have concluded upon well recognized principles of pleading that plaintiffs' complaints state actionable causes for the enjoining of the

exhibition and sale of specific obscene materials, we are satisfied that to grant the relief sought by plaintiffs (i.e., closing down the premises in question) would result in a full and pervasive prior restraint upon the freedom of speech and of the press in violation of the First and Fourteenth Amendments to the United States Constitution. (See Near v. Minnesota (1931) 283 U.S. 697, 711-715, 720 (75 L.Ed. 1357, 1365-1367, 1369, 51 S.Ct. 625); Bantam Books, Inc. v. Sullivan (1963) 372 U.S. 58, 70-71 (9 L.Ed.2d 584, 593-594, 83 S.Ct. 631); Freedman v. Maryland, supra, 380 U.S. 51, 57 (13 L.Ed.2d 649, 653-654); Carroll v. Princess Anne (1968) 393 U.S. 175, 180-181 (21 L.Ed.2d 325, 330-331, 89 S.Ct. 347); see and compare Kingsley Books, Inc. v. Brown, supra, 354 U.S.

436; see also Perrine v. Municipal Court (1971) 5 Cal.3d 656, 664-665 (97 Cal. Rptr. 320, 488 P.2d 648); Flack v. Municipal Court (1967) 66 Cal.2d 981, 985-990, passim (59 Cal.Rptr. 872, 429 P.2d 1921).) The courts of a number of our sister states have similarly held that such prior restraints as here sought by plaintiffs are constitutionally impermissible. (See General Corporation v. State ex rel. Sweeton (Ala. 1975) 320 So.2d 668, 675 (plurality opn.); Gulf States Theatres of La., Inc. v. Richardson (La. 1973) 287 So.2d 480, 489; Mitchem v. State ex rel. Schaub (Fla. 1971) 250 So.2d 883, 886-887; New Rivieria Arts Theatre v. State, supra, 412 S.W.2d 890, 893-895; Sanders v. State, supra, 203 S.Ed.2d 153, 156-157; State ex rel. Little

Beaver Theatre, Inc. vs Tobin, supra, 258 So.2d 30, 32; State ex rel. Ewing v. "Without a Stitch", supra, 307 N.E.2d 911, 917-918; but see People ex rel. Hicks v. Sarong Gals (1974) 42 Cal.App.3d 556, 562-563, (117 Cal.Rptr. 24); Bloss v. Paris Township, supra, 157 N.W.2d 260; Grove Press, Inc. v. Flask, supra, 326 F.Supp. 574, 5780580; United Theaters of Fla., Inc. v. State ex rel. Gerstein (Fla.App. 1972) 259 So.2d 210, 212-213, vacated and remanded 419 U.S. 1028 (42 L.Ed.2d 304, 95 S.Ct. 510).)

"Thus, in Sanders, the Georgia Supreme Court pointed out that 'One obscene book on the premises of a book store does not make an entire store obscene. The injunction closing this store and padlocking it as a public nuisance nessarily halted the future

sale and distribution of other printed material which may not be obscene, thereby precluding the application of the above procedural safeguards (prior notice and a prompt judicial hearing) and creating an unconstitutional restraint upon appellant. This broad result cannot be reconciled with free expression under our Constitutions.' (p.157)

"We are aware of no reported cases authorizing the closing of a bookstore or theater, even after it has been repeatedly determined judicially in a full adversary hearing that all or substantially all of the magazines or films exhibited or sold therein are obscene. Indeed plaintiffs have directed our attention to no such precedents, have presented nothing to countermand or distinguish the authorities referred

to above, and at oral argument stated they could find no authority justifying the closing of bookstores in such circumstances. While we have concluded that a court of equity, having determined particular magazines or films to be obscene, after a full adversary hearing, may enjoin the exhibition or sale thereof by those responsible, we emphasize that the closing of such bookstores or theaters, either temporarily or permanently, or the enjoining of the exhibition or sale on said premises of magazines or films not specifically so determined to be obscene, constitutes an impermissible prior restraint in violation of the First and Fourteenth Amendments to the United States Constitution."

While it is recognized that the Busch case,

supra, was decided on demurrer, it is clear that for this Court to order the defendants' theatre closed would constitute a full and pervasive prior restraint upon the freedom of speech and press in violation of the First and Fourteenth Amendments to the United States Constitution.

Basing its decision then on the Busch case, supra, and the host of authorities cited therein, this Court must reluctantly deny plaintiffs the ultimate relief sought; to-wit: Closure of defendants' theatre for one year, and turn to some other means of giving full recognition to the jury's determinations which this Court considers as the voice of the majority of the moral and decent citizens in the County of Orange, in addition to this Court's independent determinations based on the totality of all the evidence and circumstances herein. In Busch, supra, the Court at page 57, said:

"An abatement of a nuisance is accomplished in a court of equity by means of an injunction proper and suitable to the facts of each case . . . ."

Based on the above then, the Court renders judgment and makes orders on constructive trust, revocation of defendants' license, closure of defendants' theatre, and other injunctive relief as follows:

O R D E R S

I

Judgment for defendants on issue of constructive trust. Plaintiff's prayer, request, and motion to impose a constructive trust on defendants' box office receipts for the period September 3, 1975 to April 12, 1977 is denied.

II

Judgment for defendants on the issue of defendants' license revocation. Plaintiff's prayer, request, and motion to

confirm and approve the actior of the City Council in Resolution 76-134 dated October 26, 1976, revoking all defendants' licenses and permits is denied.

III

Judgment for Defendants on the issue of closure of Defendants' Mitchell Brothers' Santa Ana Theatre for one year. The Court finds such a closure is constitutionally impermissible, as constituting a "prior restraint" upon Defendants in violation of the First and Fourteenth Amendments to the United States Constitution. Plaintiff's motion and request is denied.

IV

Judgment for Plaintiff by way of permanent injunction against Defendants as follows:

A. Defendants, directly or indirectly, are permanently enjoined and restrained from engaging in or

performing in Orange County, California, the act of advertising or exhibiting any of the following motion pictures, or any part thereof:

1. Sodom and Gomorrah
2. Behind the Green Door
3. Inside Marilyn Chambers
4. Autobiography of a Flea
5. Sensations
6. Teenage Fantasies
7. Teenage Cruisers
8. Love in Strange Places
9. The Story of Joanna
10. French Classmates
11. Hungry Mouth

B. For a period of 24 months from July 1, 1978, Defendants are ordered to allow officers and employees of the City of Santa Ana free and total access to all parts of the theatre and theatre

premises, upon their request, for the express purpose of monitoring the activity and conduct in and around the theatre, as well as monitoring Defendants' compliance with the orders herein.

C. Prior to July 1, 1978, Defendants James Mitchell and Artie Mitchell are ordered and directed to deposit the sum of $100,000.00 in trust for the City of Santa Ana at the United California Bank, Santa Ana Main Branch, as a security deposit against future attorney fees, costs and expenses incurred by the City of Santa Ana, in connection with any further public nuisance action that the City Council may determine to bring against Defendants in connection with the operation of

their Mitchell Brothers' Santa Ana Theatre. Future lawsuits are defined as any lawsuits filed subsequent to July 1, 1978. Withdrawals from this account to be upon written order of a Judge of the Orange County Superior Court on motion of Plaintiff in said lawsuit, if any, duly supported with evidence in support of the withdrawal, and on the further and express condition that on the merits, a Judge or jury has previously determined that Defendants maintained a public nuisance by exhibiting an obscene motion picture film at the Mitchell Brothers' Santa Ana Theatre and which is involved in said lawsuit. It is further ordered that all interest from this account accrue to the

benefit of Defendants. At the expiration of two (2) years from July 1, 1978, in the event that there is a balance remaining in the account and on motion of Defendants, an Orange County Superior Court Judge, upon determination that no public nuisance lawsuits by Plaintiff are then pending against Defendants in the Orange County Superior Court, may order termination of the account, and any balance paid to the Defendants. Defendants are further ordered to present proof of this deposit with the Court no later than July 10, 1978. Nothing herein is to be construed as a substitute or alternative to any damages that may be awarded the

City by a Judge or jury. Plaintiff is ordered to provide the Bank with a copy of this Order.

D. Upon the Judgment herein becoming final, the following named motion picture film prints declared obscene herein, and now in evidence are ordered destroyed pursuant to Penal Code Section 312, or other applicable law.

DATED: June 6, 1978

/s/ Marvin G. Weeks
Marvin G. Weeks
Judge (Assigned) of
the Superior Court

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

PEOPLE OF THE STATE OF CALIFORNIA ex rel KEITH GOW, CITY ATTORNEY OF THE CITY OF SANTA ANA, CALIFORNIA, Plaintiff, vs MITCHELL BROTHERS' SANTA ANA THEATRE, etc., et al, Defendants.	No. 25-65-30 JUDGMENT ON VERDICTS IN OPEN COURT

This action came on regularly for trial on the 11th day of October 1977 in Department 1 Extra Sessions sitting in Departments 18, 37, and 40 of the above entitled court, the Honorable MARVIN G. WEEKS, Judge Assigned, presiding; the plaintiff appearing by attorney JAMES J. CLANCY and the defendants appearing by attorney JOSEPH RHINE.

A jury of 12 persons was regularly

impaneled and sworn to try the action. Witnesses on the part of the plaintiff and the defendants were sworn and examined. After hearing the evidence, the arguments of counsel, and instructions of the Court, the jury retired to consider of their verdicts and subsequently returned into Court, and being called answered to their names and duly rendered their verdicts in writing in words and figures as follows, to-wit:

"TITLE OF COURT AND CAUSE," VERDICT

We, the jury in the above-entitled action, find that the motion picture film "Sodom and Gomorrah" is obscene matter taken as a whole, the predominant appeal of which to the average adult person, applying contemporary standards in the State of California is to the prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion; and it is matter which taken

as a whole goes substantially beyond the customary limits of candor in the State of California in the description or representation of such matter; and is matter which taken as a whole is utterly without redeeming social importance. Dated: December 6, 1977. (Signed) Phoebe L. Gantner, Foreman.

"TITLE OF COURT AND CAUSE," VERDICT We, the jury in the above-entitled action, find that the motion picture film "Behind the Green Door" is obscene matter taken as a whole, the predominant appeal of which to the average adult person, applying contemporary standards in the State of California is to the prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion; and it is matter which taken as a whole goes substantially beyond the customary limits of candor in the State of California in the description or representation of such matter; and is matter which taken as a whole is utterly without

redeeming social importance.
Dated: December 6, 1977. (Signed)
Phoebe L. Gantner, Foreman.

"TITLE OF COURT AND CAUSE," VERDICT

We, the jury in the above-entitled action, find that the motion picture film "Inside Marilyn Chambers" is obscene matter taken as a whole, the predominant appeal of which to the average adult person, applying contemporary standards in the State of California is to the prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion; and it is matter which taken as a whole goes substantially beyond the customary limits of candor in the State of California in the description or representation of such matter; and is matter which taken as a whole is utterly without redeeming social importance. Dated: December 6, 1977. (Signed) Phoebe L. Gantner, Foreman.

"TITLE OF THE COURT AND CAUSE,"

VERDICT We, the jury in the above-entitled action, find that the motion picture film "Autobiography of a Flea" is obscene matter taken as a whole, the predominant appeal of which to the average adult person, applying contemporary standards in the State of California is to the prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion; and it is matter which taken as a whole goes substantially beyond the customary limits of candor in the State of California in the description or representation of such matter; and is matter which taken as a whole is utterly without redeeming social importance. Dated: December 6, 1977. (Signed) Phoebe L. Gantner, Foreman.

"TITLE OF THE COURT AND CAUSE,"

VERDICT We, the jury in the above-entitled action, find that the motion picture film

"Sensations" is obscene matter taken as a whole, the predominant appeal of which to the average adult person, applying contemporary standards in the State of California is to the prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion; and it is matter which taken as a whole goes substantially beyond the customary limits of candor in the State of California in the description or representation of such matter; and is matter which taken as a whole is utterly without redeeming social importance. Dated: December 6, 1977. (Signed) Phoebe L. Gantner, Foreman.

"TITLE OF THE COURT AND CAUSE," VERDICT We, the jury in the above-entitled action, find that the motion picture film "Teenage Fantasies" is obscene matter taken as a whole, the predominant appeal of which to the average adult person, applying

contemporary standards in the State of California is to the prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion; and it is matter which taken as a whole goes substantially beyond the customary limits of candor in the State of California in the description or representation of such matter; and is matter which taken as a whole is utterly without redeeming social importance. Dated: December 6, 1977. (Signed) Phoebe L. Gantner, Foreman.

"TITLE OF THE COURT AND CAUSE," VERDICT We, the jury in the above-entitled action, find that the motion picture film "Teenage Cruisers" is obscene matter taken as a whole, the predominant appeal of which to the average adult person, applying contemporary standards in the State of California is to the prurient interest, that is, a shameful or morbid interest in nudity

sex or excretion; and it is matter which taken as a whole goes substantially beyond the customary limits of candor in the State of California in the description or representation of such matter; and is matter which taken as a whole is utterly without redeeming social importance. Dated: December 6, 1977. (Signed) Phoebe L. Gantner, Foreman.

"TITLE OF THE COURT AND CAUSE," VERDICT We, the jury in the above-entitled action, find that the motion picture film "Love in Strange Places" is obscene matter taken as a whole, the predominant appeal of which to the average adult person, applying contemporary standards in the State of California is to the prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion; and it is matter which taken as a whole goes substantially beyond the customary limits of candor in

the State of California in the description or representation of such matter; and is matter which taken as a whole is utterly without redeeming social importance. Dated: December 6, 1977. (Signed) Phoebe L. Gantner, Foreman.

"TITLE OF THE COURT AND CAUSE," VERDICT We, the jury in the above-entitled action, find that the motion picture film "The Story of Joanna" is obscene matter taken as a whole, the predominant appeal of which to the average adult person, applying contemporary standards in the State of California is to the prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion; and it is matter which taken as a whole goes substantially beyond the customary limits of candor in the State of California in the description or representation of such matter; and is matter which taken as a whole

is utterly without redeeming social importance. Dated: December 6, 1977. (Signed) Phoebe L. Gantner, Foreman.

"TITLE OF THE COURT AND CAUSE,"

VERDICT We, the jury in the above-entitled action, find that the motion picture film "Summer of Laura" is not obscene matter taken as a whole, the predominant appeal of which to the average adult person, applying contemporary standards in the State of California is to the prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion; and it is matter which taken as a whole goes substantially beyond the customary limits of candor in the State of California in the description or representation of such matter; and is matter which taken as a whole is utterly without redeeming social importance. Dated: December 6, 1977. (Signed) Phoebe L. Gantner, Foreman.

"TITLE OF THE COURT AND CAUSE,"

VERDICT We, the jury in the above-entitled action, find that the motion picture film "My Erotic Fantasies" is not obscene matter taken as a whole, the predominant appeal of which to the average adult person, applying contemporary standards in the State of California is to the prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion; and it is matter which taken as a whole goes substantially beyond the customary limits of candor in the State of California in the description or representation of such matter; and is matter which taken as a whole is utterly without redeeming social importance. Dated: December 6, 1977. (Signed) Phoebe L. Gantner, Foreman.

"TITLE OF THE COURT AND CAUSE,"

VERDICT We, the jury in the above-entitled action, having heretofore found that the

following motion picture films is/are obscene as defined by law: (Name of Film) 1. Sodom & Gomorrah 2. Behind the Green Door 3. Inside Marilyn Chambers 4. Autobiography of a Flea 5. Sensations 6. Teen Age Fantasies 7. Teenage Cruisers 8. French Classmates 9. Love in Strange Places 10. Story of Joanna Further find that the showing of said film at the Mitchell Brothers Santa Ana Theatre located at 1565 West 17th Street, Santa Ana, California, constitutes, and constituted a public nuisance as defined by law, for the following period or periods: (Dates) September 3, 1975 thru January 15, 1976 January 23, 1976 thru February 19, 1976 April 2, 1976 thru May 6, 1976 May 21, 1976 thru June 3, 1976 September 1, 1976 thru November 11, 1976 January 19, 1977 thru February 1, 1977 February 16, 1977 thru April 12, 1977 Dated: December 6, 1977

(Signed) Phoebe L. Gantner, Foreman.

"TITLE OF THE COURT AND CAUSE," VERDICT We, the jury in the above-entitled action, find that motion picture film "One of a Kind" is not obscene matter taken as a whole, the predominant appeal of which to the average adult person, applying contemporary standards in the State of California is to the prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion; and it is matter which taken as a whole goes substantially beyond the customary limits of candor in the State of California in the description or representation of such matter; and is matter which taken as a whole is utterly without redeeming social importance. Dated: December 7, 1977. (Signed) Phoebe L. Gantner, Foreman.

"TITLE OF THE COURT AND CAUSE," VERDICT We, the jury in the above-entitled action, find that the motion picture film

"Roller Babies" is not obscene matter taken as a whole, the predominant appeal of which to the average adult person, applying contemporary standards in the State of California is to the prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion; and is matter which taken as a whole goes substantially beyond the customary limits of candor in the State of California in the description or representation of such matter; and is matter which taken as a whole is utterly without redemming social importance. Dated: December 7, 1977. (Signed) Phoebe L. Gantner, Foreman.

"TITLE OF THE COURT AND CAUSE," VERDICT We, the jury in the above-entitled action, find that the motion picture film "French Class Mates" is obscene matter taken as a whole, the predominant appeal of which to the average adult person, applying

contemporary standards in the State of California is to the prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion and it is matter which taken as a whole goes substantially beyond the customary limits of candor in the State of California in the description or representation of such matter; and is matter which taken as a whole is utterly without redeeming social importance. Dated: December 7, 1977. (Signed) Phoebe L. Gantner, Foreman.

"TITLE OF THE COURT AND CAUSE," VERDICT We, the jury in the above-entitled action, find that the motion picture film "Hungry Mouth" is obscene matter taken as a whole, the predominant appeal of which to the average adult person, applying contemporary standards in the State of California is to the prurient interest, that is, a shameful or morbid interest in nudity, sex

or excretion; and it is matter which taken as a whole goes substantially beyond the customary limits of candor in the State of California in the description or representation of such matter; and is matter which taken as a whole is utterly without redeeming social importance. Dated: December 7, 1977. (Signed) Phoebe L. Gantner, Foreman.

"TITLE OF THE COURT AND CAUSE," VERDICT We, the jury in the above-entitled action, having heretofore found that the following motion picture films is/are obscene as defined by law: (Name of Film) 1. French Classmates 2. Hungry Mouth Further find that the showing of said film at the Mitchell Brothers Santa Ana Theatre located at 1565 West 17th Street, Santa Ana, California, constitutes, and constituted a public nuisance as defined by law, for the following period or periods: (Dates) March

9, 1977 to March 15, 1977 November 24, 1976 to December 21, 1976 Dated: December 7, 1977. (Signed) Phoebe L. Gantner, Foreman.

"TITLE OF THE COURT AND CAUSE," VERDICT (DAMAGES) We the Jury in the above entitled action find for the plaintiff herein and assess the amount of nominal and/or actual or compensatory damages against the defendant or defendants indicated for each period of public nuisance which we have previously determined to have been maintained at the Mitchell Brothers' Santa Ana Theatre as follows:

	From	Through
1.	9-3-75	1-15-76

Defendant(s)

a. Mitchell Brothers' Santa Ana Theatre

b. Cinema 7, Inc.

c. M.B.F.G. Theatre Circuit, Inc.

	From	Through

1. (Continued)

   d. Demich, Inc.

   e. Mitchell Brothers Film Group

   f. James Mitchell

   g. Artie Mitchell

   Nominal Damages: $ Ø

   Compensatory Damages: $ 27,000-

2. 1-23-76 2-19-76

   Defendant(s)

   a. Mitchell Brothers' Santa Ana Theatre

   b. Cinema 7, Inc.

   c. M. B. F. G. Theatre Circuit, Inc.

   d. Demich, Inc.

   e. Mitchell Brothers' Film Group

   f. James Mitchell

   g. Artie Mitchell

   Nominal Damages: $ Ø

   Compensatory Damages: $ 5,600-

	From	Through
3.	4-2-76	5-6-76

Defendant(s)

a. Mitchell Brothers' Santa Ana Theatre

b. Cinema 7, Inc.

c. M B F G Theatre Circuit, Inc.

d. Demich, Inc.

e. Mitchell Brothers' Film Group

f. James Mitchell

g. Artie Mitchell

Nominal Damages: $ Ø

Compensatory Damages: $ 7,000-

4.	5-21-76	6-3-76

Defendant(s)

a. Mitchell Brother' Santa Ana Theatre

b. Cinema 7, Inc.

c. M.B.F.G. Theatre Circuit Inc.

From Through

4. (Continued)

d. Demich, Inc.

e. Mitchell Brothers' Film Group

f. James Mitchell

g. Artie Mitchell

Nominal Damages: $ Ø

Compensatory Damages: $ 2,800-

5. 9-1-76 11-11-76

Defendant(s)

a. Mitchell Brothers Santa Ana Theatre

b. Cinema 7, Inc.

c. M. B. F. G. Theatre Circuit, Inc.

d. Demich, Inc.

e. Mitchell Brothers' Film Group

f. James Mitchell

g. Artie Mitchell

Nominal Damages: $ Ø

Compensatory Damages: $ 14,400-

	From	Through
6.	1-19-77	2-1-77

Defendant(s)

a. Mitchell Brothers Santa Ana Theatre

b. Cinema 7, Inc.

c. M. B. F. G. Theatre Circuit, Inc.

d. Demich, Inc.

e. Mitchell Brothers Film Group

f. James Mitchell

g. Artie Mitchell

Nominal Damages: $ Ø

Compensatory Damages: $ 2,800-

7.	2-16-77	4-12-77

Defendant(s)

a. Mitchell Brothers' Santa Ana Theatre

b. Cinema 7, Inc.

c. M. B. F. G. Theatre Circuit, Inc.

From Through

7. (Continued)

d. Demich, Inc.

e. Mitchell Brothers Film Group

f. James Mitchell

g. Artie Mitchell

Nominal Damages: $ Ø

Compensatory Damages: $ 9,800-

8. 3-9-77 3-15-77

Defendant(s)

a. Mitchell Brothers Santa Ana Theatre

b. Cinema 7, Inc.

c. M.B.F.G. Theatre Circuit, Inc.

d. Demich, Inc.

e. Mitchell Brothers Film Group

f. James Mitchell

g. Artie Mitchell

From Through

8. (Continued)

Nominal Damages: $ Ø

Compensatory Damages: $ 1,400-

9. 11-24-76 12-21-76

Defendant(s)

a. Mitchell Brothers Santa Ana Theatre

b. Cinema 7, Inc.

c. M B F G Theatre Circuit, Inc.

d. Demich, Inc.

e. Mitchell Brothers Film Group

f. James Mitchell

g. Artie Mitchell

Nominal Damages: $ Ø

Compensatory Damages: $ 5,600-

TOTAL NOMINAL DAMAGES: $ _____

TOTAL COMPENSATORY DAMAGES: $ 76,400-

We further find by a preponderance of the

evidence that the following named defendants were not guilty of oppression, fraud or actual malice in maintaining the public nuisances heretofore determined by us, and assess against each of said defendants and in favor of plaintiff an additional amount as exemplary or punitive damages for the sake of example and by way of punishment as follows:

	Defendant(s)	Amount
1.	Mitchell Brothers' Santa Ana Theatre	$ None
2.	Cinema 7, Inc.	$ None
3.	M. B. F. G. Theatre Circuit, Inc.	$ None
4.	Demich, Inc.	$ None
5.	Mitchell Brothers Film Group	$ None
6.	James Mitchell	$ None
7.	Artie Mitchell	$ None
	Total Exemplary Damages:	$ None

Dated: January 5, 1978 (Signed)
Phoebe Gantner, Foreman

WHEREFORE, by virtue of the law, and by reason of the premises aforesaid, it is ordered, adjudged, and decreed that said plaintiff PEOPLE OF THE STATE OF CALIFORNIA ex rel KEITH GOW, CITY ATTORNEY OF THE CITY OF SANTA ANA, CALIFORNIA, have and recover from defendants Mitchell Brothers' Santa Ana Theatre; Cinema 7, Inc.; M.B.F.G. Theatre Circuit, Inc.; Demich, Inc.; Mitchell Brothers Film Group; James Mitchell; and Artie Mitchell, jointly and severally, as and for compensatory damages, the sums of $27,000.00 for the period September 3, 1975 through January 15, 1976; $5,600.00 for the period January 23, 1976 through February 19, 1976; $7,000.00 for the period April 2, 1976 through May 6, 1976; $2,800.00 for the period May 21, 1976 through June 3, 1976; $14,400.00 for the period September 1, 1976

through November 11, 1976; $2,800.00 for the period January 19, 1977 through February 1, 1977; $9,800.00 for the period February 16, 1977 through April 12, 1977; $1,400.00 for the period March 9, 1977 through March 15, 1977; and $5,600.00 for the period November 24, 1976 through December 1976; for a total sum of $76,400.00 with interest thereon at the rate of seven per cent per annum from the date of the verdict until paid together with costs and disbursements amounting to the sum of $_____.

Judgment prepared by: Floy Ray

ORDINANCE NO. NS-1287

AN ORDINANCE OF THE CITY OF SANTA ANA ADDING SECTIONS 12-100 THROUGH 12-105 TO THE SANTA ANA MUNICIPAL CODE DECLARING THE COMMERCIAL EXPLOITATION OF PATENTLY OFFENSIVE SEXUAL CONDUCT IN LEWD FILMS AND THEATRES EXHIBITING THE SAME TO BE A PUBLIC NUISANCE AND ORDERING THEIR ABATEMENT

THE CITY COUNCIL OF THE CITY OF SANTA ANA DOES ORDAIN AS FOLLOWS:

SECTION 1: That the Santa Ana Municipal Code is hereby amended by adding a section, to be numbered 12-100, which said section reads as follows:

Sec. 12-100. Purpose and Effect. The City Council finds that the

crass commercial exploitation of explicit sexual conduct through the public exhibition of lewd films constitutes a debasement and distortion of a sensitive key relationship of human existence, central to family life, community welfare and the development of human personality; is indecent and offensive to the senses and interferes with the comforable enjoyment of life and property, in that such interferes with the interest of the public in the quality of life and total community environment, the tone of commerce in the City, property values, and the public safety; and that the continued operation of such activities is detrimental to the best health, safety, convenience, good morals and general welfare of the City of Santa Ana, and of the residents, citizens, inhabitants and businesses thereof. Pursuant to §§ 38771, 38773 and 38773.5 of the Government Code,

§ 731 of the Code of Civil Procedure, and §§ 3479, 3480, 3491 and 3494 of the Civil Code, the City Council hereby declares such activities to be a public nuisance, and herein establishes procedures for the abatement thereof. This ordinance shall apply to existing establishments which are presently engaged in the type of activity herein declared to be a public nuisance.

SECTION 2: That the Santa Ana Municipal Code is hereby amended by adding a section, to be numbered 12-101, which said section reads as follows:

Sec. 12-101. Definitions.

(A) "Lewd Film" means any motion picture film:

(1) which the average person, applying contemporary community standards, would find, when considered as a whole, appeals to the prurient interest; and

(2) which depicts or describes patently offensive representations or descriptions of:

(a) ultimate sexual acts, normal or perverted, actual or simulated; or

(b) masturbation, excretory functions, or lewd exhibition of the genitals or genital area.

Nothing herein contained is intended to include or proscribe any film which, when considered as a whole, and in the context in which it is used, possesses serious literary, artistic, political or scientific value.

(B) "Place" includes, but is not limited to, any building, structure or place, or any separate part or portion thereof, whether permanent or not, or the ground itself.

(C) "Motion picture film" shall include any:

(1) film or plate negative;

(2) film or plate positive;

(3) film designed to be projected on a screen for exhibition;

(4) films, glass slides or transparencies, either in negative or positive form designed for exhibition by projection on a screen.

(D) "Person" means any individual, partnership, firm, association, corporation, or other legal entity.

(E) "Knowledge" means having knowledge of the contents and character of the patently offensive sexual conduct which appears in such lewd film.

SECTION 3: That the Santa Ana Municipal Code is hereby amended by adding a section, to be numbered 12-102, which said section reads as follows:

Sec. 12-102. Lewd Films and Theatres Exhibiting

the Same Declared
a Public Nuisance;
Abatement Thereof.

(A) Any and every place in the City of Santa Ana where:

(1) lewd films are publicly exhibited as a regular course of business, or possessed for the purpose of such exhibition; or

(2) a lewd film is publicly and repeatedly exhibited, or possessed for the purpose of such exhibitions, is a public nuisance.

(B) Any and every lewd film which is publicly exhibited or possessed for such purpose in the City of Santa Ana is a public nuisance per se.

(C) From and after service on the theatre, or its manager, or acting manager, or person then in charge of such place, of a certified copy of this

ordinance and a cerified copy of the Resolution and order of summary abatement provided for in Section 12-103 hereof, all moneys paid thereafter as admission price to such exhibitions are also declared to be a public nuisance, as personal property used in conducting and maintaining a declared public nuisance.

(D) Upon receiving notice through service of a certified copy of this ordinance and of a cerified copy of the Resolution and order of summary abatement provided for in Section 12-103 hereof, any and every person who shall own, legally or equitably, lease, maintain, maanage, conduct, or operate a place in the City of Santa Ana which is declared to be a public nuisance as set forth and stated in Subsection (A) of this Section 12-102 is deemed to be a person who has knowledge of such nuisance for the purpose of this

ordinance and is, thereafter, responsible for its maintenance, and shall be liable thereof.

(E) The places and subject matter declared to be public nuisances under Subsections (A) through (C) of this section shall be abated pursuant to Government Code §§ 38773 and 38773.5, Code of Civil Procedure §731, and Civil Code §§ 3491 and 3494, as provided for herein.

SECTION 4: That the Santa Ana Municipal Code is hereby amended by adding a section, to be numbered 12-103, which said section reads as follows:

Sec. 12-103. Action to be Taken by City Council.

Upon a specific finding that a public nuisance, as defined in Section 12-102 hereof, exists in the City of Santa Ana, the City Council, in applying the provisions of this ordinance to such nuisance,

shall provide for the following by Resolution:

(A) Declare the fact that such nuisance exists.

(B) Set forth the description or legal description and street address of the real property which constitutes the nuisance.

(C) Set forth the evidentiary facts considered by the City Council in arriving at its factual determination that a lewd film or films, as defined in Section 12-101(A) hereof, are publicly exhibited or possessed for exhibition at such real property and are public nuisances as declared herein, including a recitation of the particular sexual conduct and acts which the City Council finds are patently offensive.

(D) Order all persons named in Section 12-102 (D) hereof to summarily abate

such public nuisances immediately, by terminating the exhibitions of such lewd film or films, or causing the same to be terminated, and voluntarily surrendering possession of the same to the court having jurisdiction of the legal proceedings brought by the City Attorney, pursuant to Sections 12-103 (E) and 12-105 of this ordinance, and notifying the City Clerk and City Council of compliance therewith by sworn affidavit, as authorized by Government Code § 38773, and as ordered by the action of the City Council in such resolution.

(E) Order the City Attorney to proceed as directed in Section 12-105 hereof and do all the things directed therein and do all things necessary to abate such public nuisance through judicial proceedings and to conclude such proceedings as expeditiously as is permissible under the law, including requesting the court to advance such

proceedings on the calendar of the court.

(F) Inform and give notice to persons named in Section 12-102(D) that:

(1) The City Council has determined that a public nuisance presently exists at such place and address, and that, under Section 12-102 (D) hereof, they are deemed to have knowledge thereof and are responsible therefor.

(2) The City Council has ordered the City Attorney, as provided for under Section 12-105 hereof, to commence legal proceedings naming such persons as defendants in a civil action to abate the same judicially under Civil Code § 3494 and Code of Civil Procedure § 731, as a supplemental remedy to the summary abatement process, authorized by Government Code § 38773 and ordered by the City Council in Section 12-103 hereof and that under subsections (A) and (B) of Sec. 12-104, the costs of

abatement of such civil abatement action filed under Civil Code § 3494 and Code of Civil Procedure §731, including investigative costs, court costs, attorney's fees, and other expenses, are made a special assessment against the parcel of land upon which such nuisance is being maintained and, upon their determination in such court action, will, by separate ordinance, be made a lien against such property and a personal obligation against the theatre operator and property owner.

(3) All films being used in conducting and maintaining such public nuisance are contraband and the subject of forfeiture.

(4) From and after service on the theatre or its manager or acting manager, or person then in charge of such place, of a certified copy of this ordinance and a certified copy of such Resolution any and all moneys paid as admission price to

such exhibitions are a public nuisance, as personal property used in conducting and maintaining such nuisance and, as such, are the subject of forfeiture.

(G) Order that a certified copy of said Resolution and a certified copy of this ordinance be delivered in any manner normally used to effectuate personal service of process as directed in Code of Civil Procedure §§ 415.10 through 416.90, to all persons of record having any legal or equitable interest in the real property, and to the regular or acting manager or persons in charge of the place therein declared a public nuisance.

SECTION 5: That the Santa Ana Municipal Code, is hereby amended by adding a section, to be numbered 12-104, which said section reads as follows:

Sec. 12-104. Action brought Pursuant to Civil

Code §§3494, et al.; Forfeiture to the General Fund of the City, Cost of Abatement; Manner of Collection.

(A) Upon judgment against the operators of the theatre in legal proceedings brought pursuant to Civil Code §§ 3491 and 3494, and Code of Civil Procedure §731, an accounting shall be made by such defendant or defendants of all moneys received by them which have been declared to be a public nuisance under Section 12-102 (C) of this ordinance. Such moneys or their equivalent shall be forfeited to the general fund of the City of Santa Ana.

(B) The cost of abatement shall include the following:

(1) investigative costs.

(2) court costs.

(3) reasonable attorney's fees arising out of the preparation for, and trial of the cause, and appeals therefrom.

(4) printing costs of trial and appellate briefs, and all other papers filed in such proceedings.

Such cost of abatement is hereby made a special assessment against the parcel of land upon which such nuisance is maintained. Upon its determination in a civil action under Civil Code §3494 and Code of Civil Procedure § 731, such shall, by special ordinance, be made a lien against such property and a personal obligation against the theatre operator and property owner and shall be collected at the same time and in the same manner as ordinary municipal taxes are collected, and shall be subject to the same penalties

and the same procedure and sale in the case of delinquency as provided for ordinary municipal taxes. All laws, applicable to the levy, collection and enforcement of municipal taxes, shall be applicable to such special assessment.

SECTION 6: That the Santa Ana Municipal Code, is hereby amended by adding a section, to be numbered 12-105, which said section reads as follows:

Sec. 12-105. Action to be Taken by City Attorney.

Upon a specific finding by Resolution of the City Council of the fact that a public nuisance exists at a particular location, the City Attorney shall:

(A) Not later than ten days after passage of said resolution, commence legal proceedings under Civil Code §§ 3491 and 3494 and Code of Civil Procedure § 731, by the filing of a civil action seeking

the following relief:

(1) A Declaratory Judgment that the motion picture or pictures named by the City Council are lewd films.

(2) A Declaratory Judgment that the films found to be lewd are public nuisances under this ordinance and such Resolution.

(3) A Declaratory Judgment that the place named by the City Council where the film or films are being exhibited is a public nuisance under this ordinance and such Resolution.

(4) An accounting of all moneys paid as admission price to the operators of the theatre from and after the time the persons maintining said nuisance receive notice of the finding by the City Council that the public nuisance exists, and a Declaratory Judgment that such moneys are a public nuisance under this

ordinance.

(5) An Order that all admission price moneys derived from the showing of the named lewd film or films and enumerated in the Court ordered accounting be forfeited to the general fund of the City of Santa Ana as contraband.

(6) An injunction enjoining and restraining all persons guilty of maintaining said nuisance from exhibiting in public the named lewd films at any time in the future in the City of Santa Ana.

(7) An Order that all positive prints of the named lewd films be forfeited as contraband under this ordinance.

(8) Judgment for the City of Santa Ana for all costs therein expended, including investigative costs, court costs, reasonable attorney's fees, and such other expenses as are provided for herein.

(9) All other relief as

the Court may deem proper.

(B) File a notice of the pendency of the action in the office of the County Recorder of the County of Orange, pursuant to Code of Civil Procedure § 409, giving the names of the parties, the object of the action, and a description of the property thereby affected.

SECTION 7: If any section, subsection, sentence, clause, phrase or portion of this ordinance is for any reason held to be invalid or unconstitutional by the decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this ordinance. The City Council of the City of Santa Ana hereby declares that it would have adopted this ordinance and each section, subsection, sentence, clause, phrase or portion thereof irrespective of the fact that any one or more

sections, subsections, clauses, phrases or portions be declared invalid or unconstitutional.

SECTION 8: Neither the adoption of this ordinance nor the repeal hereby of any ordinance shall in any manner affect the prosecution for violation of ordinances, which violations were committed prior to the effective date hereof, nor be construed as affecting any of the provisions of such ordinance relating to the collection of any such license or penalty or the penal provisions applicable to any violation thereof, nor to affect the validity of any bond or case deposit in lieu thereof, required to be posted, filed or deposited pursuant to any ordinance and all rights and obligations thereunder appertaining shall continue in full force and effect.

SECTION 9: The Clerk of the Council shall certify to the passage and

adoption of this ordinance and shall cause the same to be published in the official newspaper of the City of Santa Ana within fifteen (15) days after its adoption.

SECTION 10: This ordinance shall take effect upon posting or publication, whichever is earlier.

PASSED AND ADOPTED by the City Council of the City of Santa Ana at its regular meeting held on the 19th day of January, 1976.

ATTEST:

ORIGINAL SIGNED BY

JOHN GARTHE

MAYOR

ORIGINAL SIGNED BY

FLORENCE I. MALONE

CLERK OF THE COUNCIL

STATE OF CALIFORNIA)

COUNTY OF ORANGE) ss.

CITY OF SANTA ANA)

I, FLORENCE I. MALONE, do hereby certify that I am the Clerk of the Council of the City of Santa Ana; that the foregoing Ordinance was introduced to said Council at its regular meeting held on the 5th day of January, 1976, and was again considered by said Council at its regular meeting held on the 19th day of January, 1976, and was at said meeting passed and adopted by the following vote, to wit:

AYES,	COUNCILMEN:	Yamamoto, Evans, Bricken, Ortiz, Garthe, Brandt, Ward
NOES,	COUNCILMEN:	None
ABSENT,	COUNCILMEN:	None

ORIGINAL SIGNED BY

FLORENCE I. MALONE

CLERK OF THE COUNCIL

APPROVED AS TO FORM:

/s/ Keith L. Gow

KEITH L. GOW, CITY ATTORNEY

THE FOREGOING INSTRUMENT IS A FULL TRUE, AND CORRECT COPY OF THE ORIGINAL ON FILE IN THIS OFFICE.

ATTEST: October 20 1977

FLORENCE I. MALONE

CLERK OF THE COUNCIL,

CITY OF SANTA ANA

(SEAL)

FLORENCE I. MALONE

BY /s/ MARTHA E. LEA

DEPUTY

ORDINANCE NO. NS-1325

AN EMERGENCY ORDINANCE OF THE CITY OF SANTA ANA AMENDING SECTIONS 12-101 THROUGH 12-105 OF THE SANTA ANA MUNICIPAL CODE DECLARING THE COMMERCIAL EXPLOITATION OF PATENTLY OFFENSIVE SEXUAL CONDUCT IN LEWD FILMS AND THEATRES EXHIBITING THE SAME TO BE A PUBLIC NUISANCE AND ORDERING THEIR ABATEMENT.

THE CITY COUNCIL OF THE CITY OF SANTA ANA DOES ORDAIN AS FOLLOWS:

SECTION 1: That section 12-101 of the Santa Ana Municipal Code is hereby amended to read as follows:

Sec. 12-101. Definitions.

(A) "Lewd Film" means any motion picture film:

(1) which the average person, applying contemporary community standards, would find, when considered as a whole, appeals to the prurient interest;

and

(2) which depicts or describes patently offensive representations or descriptions; of

(a) ultimate sexual acts, normal or perverted, actual or simulated; or

(b) masturbation, excretory functions, or lewd exhibition of the genitals or genital area.

Nothing herein contained is intended to include or proscribe any film which, when considered as a whole, and in the context in which it is used, possesses serious literary, artistic, political or scientific value.

(B) "Place" includes, but is not limited to, any building, structure or place, or any separate part or portion thereof, whether permanent or not, or the ground itself.

(C) "Motion picture film" shall include any:

(1) film or plate negative;

(2) film or plate positive;

(3) film designed to be projected on a screen for exhibition;

(4) films, glass slides or transparencies, either in negative or positive form designed for exhibition by projection on a screen.

(5) video tape or any other medium used to electronically reproduce images on a screen.

(D) "Person" means any individual, partnership, firm, association, corporation, or other legal entity.

(E) "Knowledge" means having knowledge of the contents and character of the patently offensive sexual conduct which appears in such lewd film.

SECTION 2: That section 12-102

of the Santa Ana Municipal Code is hereby amended to read as follows:

Sec. 12-102. Lewd Films and Theatres Exhibiting the Same Declared a Public Nuisance; Abatement Thereof.

(A) Any and every place in the City of Santa Ana where:

(1) lewd films are publicly exhibited as a regular course of business, or possessed for the purposes of such exhibition; or

(2) a lewd film is publicly and repeatedly exhibited, or possessed for the purpose of such exhibition, is a public nuisance.

(B) Any and every lewd film which is publicly exhibited or possessed for such purpose at a place which is a public nuisance under this section, is a public

nuisance per se.

SECTION 3: That section 12-103 of the Santa Ana Municipal Code is hereby amended to read as follows:

Sec. 12-103. Knowledge of Nuisance Presumed From Service of Copy of Resolution; Responsibility of Parties Therefor; Abatement of Such Nuisance.

(A) Upon receiving notice through service of a certified copy of this ordinance and of a certified copy of the Resolution provided for herein, any and every person who shall own, legally or equitably, lease, maintain, manage, conduct, or operate a place in the City of Santa Ana which is declared to be a public nuisance as set forth and stated in Subsection

(A) of Section 12-102 is deemed to be a person who has knowledge of such nuisance for the purpose of this ordinance and is, thereafter, responsible for its maintenance, and shall be liable therefor.

(B) The places and subject matter declared to be public nuisances under section 12-102 hereof shall be abated pursuant to Government Code sections 38773 and 38773.5, Code of Civil Procedure section 731, and Civil Code sections 3491 and 3494, as provided for herein.

SECTION 4: That section 12-104 of the Santa Ana Municipal Code is hereby amended to read as follows:

Sec. 12-104. Action to be Taken by City Council.

Upon a specific finding that a public nuisance, as defined in Section 12-102 hereof, exists in the City of Santa Ana, the City Council, in applying the provisions

of this ordinance to such nuisance, shall provide for the following by Resolution:

(A) Declare the fact that such nuisance exists;

(B) Set forth the description or legal description and street address of the real property which constitutes the nuisance;

(C) Set forth a statement of facts upon which the City Council declaration of nuisance is based;

(D) Order the revocation of all licenses and permits which have been issued as a part of the operation of such business, subject to confirmation by the Court in the judicial proceedings required herein. Criminal proceedings for transacting business without a license at such address shall not be filed until the order of license revocation by the City Council has been confirmed by judicial order;

(E) Order all persons named in Section 12-103 (A) hereof to summarily abate such public nuisances immediately, by terminating the exhibitions of such lewd film or films, or causing the same to be terminated, and voluntarily surrendering possession of the same to the court having jurisdiction of the legal proceedings brought by the City Attorney, pursuant to the provisions of this ordinance, and notifying the City Clerk and City Council of compliance therewith by sworn affidavit;

(F) Order the City Attorney to proceed as directed in Section 12-105 hereof and do all things necessary to abate such public nuisance through judicial proceedings and to conclude such proceedings as expeditiously as is permissible under the law;

(G) Inform and give notice to persons named in Section 12-103 (A) that:

(1) The City Council has determined that a public nuisance presently exists at such place and address, and has revoked the licenses and permits at that place, subject to Court confirmation, and that, under Section 12-103 (A) hereof, they are deemed to have knowledge thereof and are responsible therefor;

(2) The City Council has ordered the City Attorney, as provided for under Section 12-105 hereof, to commence legal proceedings naming such persons as defendants in a civil action to abate the same judicially under Civil Code section 3494 and Code of Civil Procedure section 731, and to seek recovery in said action of the costs of abatement, including investigative costs, Court costs, attorney's fees, and other expenses;

(3) All lewd motion picture films being used in conducting and

maintaining such public nuisances are considered to be contraband and the subject of forfeiture; and

(4) From and after service on the place or its manager or acting manager, or person then in charge of such place, of a certified copy of this ordinance and a certified copy of such Resolution, any and all moneys paid as admission price to or for the exhibition or exhibitions of such lewd motion picture films are considered to be a public nuisance, as personal property used in conducting and maintaining such nuisance and, that a forfeiture of the same will be requested in the judicial proceedings required herein.

(H) Order that a certified copy of said Resolution and a certified copy of this ordinance be delivered forthwith in any manner normally used to effectuate personal service of process as directed

in Code of Civil Procedure sections 415.10 through 416.90, to all persons of record having any legal or equitable interest in the real property, and to the regular or acting manager or persons in charge of the place therein declared a public nuisance.

SECTION 5: That section 12-105 of the Santa Ana Municipla Code is hereby amended to read as follows:

Sec. 12-105. Action to be Taken by City Attorney.

Upon a specific finding by Resolution of the City Council of the fact that a public nuisance exists at a particular location, the City Attorney shall:

(A) Forthwith, but not later than five working days after passage of said Resolution, commence legal proceedings under Civil Code sections 3491 and 3494 and Code of Civil Procedure section 731, by the filing of a civil action seeking

the following relief:

(1) An Order that the motion picture or pictures named by the City Council are lewd, as defined herein;

(2) An Order that the place named by the City Council where the film or films are being exhibited is a public nuisance and that the action taken by the City Council to revoke the licenses issued to that place of business was lawful;

(3) An injunction enjoining and restraining all persons maintaining said nuisance from exhibiting in public the named lewd films at any time in the future in the City of Santa Ana;

(4) An Order that all positive prints of the named lewed films be forfeited as contraband;

(5) An accounting of all moneys paid as admission price to or for the exhibition or exhibitions of such lewd

motion picture films, from and after the time the persons maintaining said nuisance receive a copy of the Resolution of the City Council finding that a public nuisance exists, and a judgment that such moneys are a public nuisance;

(6) An Order that all admission price moneys or valuable consideration received and enumerated in the Court ordered accounting be forfeited to the general fund of the City of Santa Ana as contraband, or as property belonging to the City of Santa Ana;

(7) Judgment for the City of Santa Ana for all costs expended in abating the public nuisance, including investigative costs, Court costs, reasonable attorney's fees, and such other expenses as are provided for herein; and

(8) All other relief as the Court may deem proper.

(B) File a notice of the pendency of the action in the office of the County Recorder of the County of Orange, pursuant to Code of Civil Procedure section 409, giving the names of the parties, the object of the action, and a description of the property thereby affected.

SECTION 5: If any section, subsection, sentence, clause, phrase or portion of this ordinance is for any reason held to be invalid or unconstitutional by the decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this ordinance. The City Council of the City of Santa Ana hereby declares that it would have adopted this ordinance and each section, subsection, sentence, clause, phrase or portion thereof irrespective of the fact that any one or more sections, subsections, clauses, phrases or portions

be declared invalid or unconstitutional.

SECTION 6: This Ordinance amends those sections of the Santa Ana Municipal Code which were established by Ordinance No. NS-1287, adopted on January 5, 1976. The adoption of this Ordinance shall not in any manner affect the prosecution for violations of Ordinance No. NS-1287, which violations were committed prior to the effective date of this Ordinance.

SECTION 7: URGENCY CLAUSE.

Pursuant to the provisions of Subsection (b) of section 36937 of the Government Code of the State of California, this Ordinance is for the immediate preservation of the public peace, health, and safety and shall take effect immediately. The facts constituting the urgency are as follows:

The purpose of this Ordinance, as is evident from its content,

is to enable the City of Santa Ana to abate the type of public nuisance being committed within the City. The City Council deems the showing of lewd films, as defined herein, as being a public nuisance contrary to the public peace, health and safety of the City and its residents. This Ordinance makes certain changes in previously adopted and effective Ordinance NS-1287 required by the decision of the California Court of Appeal in People ex rel. Camil v. Buena Vista Cinema, 129 Cal. Rptr. 315. The City Council deems it necessary for the immediate preservation of the public peace, health and safety that immediate action be taken to abate said

public nuisance pursuant to the terms of this Ordinance.

Adopted this 4th day of October, 1976, by the following vote:

AYES, COUCILMEN: Yamamoto, Bricken, Ortiz, Garthe, Evans, Brandt, Ward

NOES, COUNCILMEN: None

ABSENT, COUNCILMEN: None

/s/ John Garthe

MAYOR

Adopted as a regular ordinance the 26th day of October, 1976, by the following vote:

AYES, COUNCILMEN: Yamamoto,

Ward, Ortiz,
Garthe

NOES, COUNCILMEN: Brandt

ABSENT, COUNCILMEN: Bricken,
Evans

/s/ John Garthe
MAYOR

ATTEST:

/s/ Florence I. Malone
CLERK OF THE COUNCIL

APPROVED AS TO FORM:

/s/ Keith L. Gow
KEITH L. GOW, CITY ATTORNEY

THE FOREGOING INSTRUMENT IS A FULL, TRUE, AND CORRECT COPY OF THE ORIGINAL ON FILE IN THIS OFFICE.

ATTEST: Nov. 2, 1976
FLORENCE I. MALONE,
CLERK OF THE COUNCIL,
CITY OF SANTA ANA
(SEAL)

FLORENCE I. MALONE
BY /s/ MARTHA E. LEA
DEPUTY

RESOLUTION NO. 76-134

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF SANTA ANA DETERMINING THAT THE REAL PROPERTY AND ACTIVITY KNOWN AS THE MITCHELL BROTHERS' SANTA ANA THEATER, LOCATED AT 1565 WEST 17TH STREET, SANTA ANA, CALIFORNIA, IS IN VIOLATION OF ORDINANCE NS 1325 OF THE CITY OF SANTA ANA; DECLARING SUCH ACTIVITY TO BE A PUBLIC NUISANCE, REVOKING ALL LICENSES AND PERMITS, AND ORDERING ABATEMENT; AND ORDERING THE CITY ATTORNEY TO TAKE ALL STEPS NECESSARY TO COMPLY WITH SECTION 12-105 OF THE SANTA ANA MUNICIPAL CODE.

BE IT RESOLVED by the City

EXHIBIT "D"

Council of the City of Santa Ana:

Section 1. Pursuant to Section 38771 of the Government Code which authorizes the City Legislative Body to declare by Ordinance what constitutes a nuisance, the City Council of Santa Ana did, on the 5th day of January, 1976, adopt Ordinance No. NS-1287 which became effective on the 18th day of February, 1976, and did supersede the same with Ordinance No. NS 1325, adopted as an urgency Ordinance on the 4th day of October, 1976, to become effective immediately upon adoption. Said Ordinance declares:

A. Any and every place in the City of Santa Ana where: (1) lewd films are publicly exhibited as a regular course of business, or possessed for the purpose of such exhibition; or (2) a lewd film is publicly and repeatedly exhibited, or possessed for the purpose of such

exhibition, to be a public nuisance.

B. Any and every lewd film which is publicly exhibited or possessed for such purpose at a place which is a public nuisance under (A) above, to be a public nuisance per se.

C. From and after service on the place, or its manager, or acting manager, or person then in charge of such place, or a certified copy of Ordinance No.NS 1325, and a certified copy of the Resolution authorized by said Ordinance, all moneys paid thereafter as admission price to such exhibitions are also a public nuisance, as personal property used in conducting and maintaining a declared public nuisance.

D. Upon receiving notice through service of a certified copy of Ordinance NS.1325 and of a certified copy of the Resolution authorized by said Ordinance, any and every person who shall own,

legally or equitably, lease, maintain, manage, conduct, or operate a place in the City of Santa Ana where lewd films are publicly exhibited, or possessed for the purpose of such exhibition in the regular course of business, or where a single lewd film is publicly and repeatedly exhibited, or possessed for the purpose of such exhibition, is deemed to be a person who has knowledge of such nuisance for purposes of said Ordinance and this Resolution and is, thereafter, responsible for its maintenance, and shall be liable therefor.

Section 2. Pursuant to the provisions of Ordinance NS.1325, the City Council of Santa Ana makes the following findings of fact concerning the identity of the motion picture films which have been and are being exhibited at the "Mitchell Brothers' Santa Ana Theater":

A. Upon the instructions of

the Santa Ana City Attorney, a continuous surveillance of the films being exhibited at the "Mitchell Brothers' Santa Ana Theater" has been maintained, which surveillance shows that, during the ten-month period from November 28, 1975 through September 1976, approximately 13 programs have been exhibited at said theater with each program containing one or more motion picture films. The titles of the films exhibited at each of the 13 programs and the approximate playing date of each is set forth in Enclosure A to this Resolution.

B. Photographic time-motion studies of the 26 motion picture films and previews exhibited at the "Mitchell Brothers' Santa Ana Theater" during the ten-month period from November 28, 1975 through September 1976, being programs 1 through 13 described in Enclosure A, have been prepared and have been filed with the City

Council, and the members of the City Council have examined the photographic content in each of such time-motion studies.

Section 3. Pursuant to the provisions of Ordinance NS. 1325, and based upon the evidentiary facts referred to in Section 2 above, the City Council of Santa Ana makes the following findings of fact concerning the character and nature of the aforementioned motion picture films which have been, and are being, exhibited at the "Mitchell Brothers' Santa Ana Theater":

A. Each of the aforementioned 26 motion picture films and previews which have been exhibited at the "Mitchell Brothers' Santa Ana Theater" as a part of programs 1 through 13, is a lewd film as defined in Section 12-101 of the Santa Ana Municipal Code, in that (1) the average person, applying contemporary community standards, would find that, when considered

as a whole, said film appeals to the prurient interest, and (2) said film depicts and describes patently offensive representations and descriptions of ultimate sexual acts, and (3) said film possesses no serious literary, artistic, political, or scientific value. The patently offensive representations and descriptions which are referred to are depicted on the individual photographs of the above described time-motion studies which have been examined by the City Council, and such studies are incorporated herein by reference.

Section 4. All licenses and permits which have been issued as a part of the operation of the "Mitchell Brothers' Santa Ana Theater" are hereby revoked, subject to confirmation by the Court, in judicial proceedings required herein. Criminal proceedings for transacting

business without a license at the "Mitchell Brothers' Santa Ana Theater" shall not be filed until the order of license revocation by the City Council has been confirmed by judicial order.

Section 5. Pursuant to the provisions of Ordinance NS. 1325, and based upon evidentiary facts contained in the business records of the City of Santa Ana and other evidence on file with the City Council in matters pertaining to the "Mitchell Brothers' Santa Ana Theater", which are incorporated herein by reference as though set forth herein in full, the City Council of Santa Ana makes the following findings of fact with respect to the place commonly known as the "Mitchell Brothers' Santa Ana Theater":

A. There is presently located in the City of Santa Ana a motion picture business commonly known as the "Mitchell

Brothers' Santa Ana Theater" doing business upon real property known as 1565 West 17th Street, Santa Ana, County of Orange, California, being:

That portion of Lot 3 of the Mabury Tract, in the City of Santa Ana, County of Orange, State of California, as per map recorded in Book 165, Page 301 of the Deeds, Records of Los Angeles County, California, described as follows:

Beginning at a point North 0° 48' 00" East 367.72 feet from the Southwest corner of that certain parcel of land described in Parcel 1 of the Deed recorded May 7, 1953 in Book 2499, Page 293 of Official Records, records of said Orange County, said

point of beginning being on the Westerly line of above mentioned parcel of land; thence North 0° 48' 00" East 250.00 feet continuing along said Westerly line; thence North 89° 49' 00" East 90.00 feet, leaving said Westerly line; thence South 0° 48' 00" 250.00 feet; thence South 89° 49' 00" West 90.00 feet to the point of beginning.

B. The motion picture business commonly known as the "Mitchell Brothers' Santa Ana Theater" located at 1565 West 17th Street, Santa Ana, California, is a public nuisance, being a place where lewd films are publicly exhibited, and possessed for the purpose of such exhibition, as a regular course of business.

C. United Artists Theatres, Inc., 172 Golden Gate Avenue, San Francisco,

California 94102, is the Lessee of the real property commonly known as "Mitchell Brothers' Santa Ana Theater".

D. JOHN DOE 1 is the sub-lessee or assignee of the principle lease of the real property commonly known as the "Mitchell Brothers' Santa Ana Theater", 1565 West 17th Street, Santa Ana, California.

E. Allison Honer Co., a Partnership, P.O. Box 84, Santa Ana, California 92702, is the owner of the real property commonly known as "Mitchell Brothers' Santa Ana Theater", located at 1565 West 17th Street, Santa Ana, California.

F. Bank of America National Trust and Savings Association, a National Banking Association, is the owner of a security interest in such real property, as shown on the Trust Deed recorded on September 10, 1965 in Book 7660, Page 155,

Official Records.

G. M.B.F.G. Theatre Circuit, Inc., is the holder of a business license issued by the City of Santa Ana, for the operation of the business conducted upon the real property commonly known as the "Mitchell Brothers' Santa Ana Theater", 1565 West 17th Street, Santa Ana, California.

H. JOHN DOE 2 is the operator, JOHN DOE 3 is the manager, and JOHN DOE 4 is the acting manager or person in charge of the establishment commonly known as the "Mitchell Brothers' Santa Ana Theater", located at 1565 West 17th Street, Santa Ana, California.

Section 6. United Artists Theaters, Inc., Allison Honer Co., a Partnership, Bank of America National Trust and Savings Association, M.B.F.G. Theater Circuit, Inc., and JOHN DOES 1 through 4, and

all other persons of record, having legal or equitable title in the real property known as 1565 West 17th Street, Santa Ana, California, on which is located the motion picture business commonly known as the "Mitchell Brothers' Santa Ana Theater" are:

A. hereby informed and given notice that (1) the City Council has determined that a public nuisance exists on the property located at 1565 West 17th Street, Santa Ana, California; namely, the "Mitchell Brothers' Santa Ana Theater" and that, under Section 12-103 of the Santa Ana Municipal Code, they are responsible therefor upon receiving notice through service of a certified copy of the Ordinance and a certified copy of this Resolution, and (2) any and all licenses and permits heretofore issued for the premises known as 1565 West 17th Street, Santa Ana, California, are hereby revoked under the

provisions set forth in Section 12-104 (D) of the Santa Ana Municipal Code; and

B. hereby ordered, under Government Code Section 38773 and Section 12-104(E) of the Santa Ana Municipal Code, to summarily abate the abovementioned public nuisances immediately, by terminating, or causing to be terminated, the exhibition of the abovedescribed lewd films and to voluntarily surrender possession of the same to the Court having jurisdiction of the legal proceedings which the City Attorney has been ordered to institute under Section 12-105 of the Santa Ana Municipal Code. Each of the abovementioned persons shall notify the City Council of Santa Ana by sworn affidavit of him compliance with this Order of Summary Abatement, as required by Section 12-104(E) of the Santa Ana Municipal Code.

Section 7. United Artists

Theaters, Inc., Allison Honer Co., a Partnership, Bank of America National Trust and Savings Association, M.B.F.G. Theater Circuit, Inc., and JOHN DOES 1 through 4, and all other persons of record, having legal or equitable title in the real property known as 1565 West 17th Street, Santa Ana, California, on which is located the motion picture business commonly known as the "Mitchell Brothers' Santa Ana Theater", are hereby informed and given notice that:

A. under Sections 12-104(F) and 12-105 of the Santa Ana Municipal Code, the City Attorney has been ordered to institute legal proceedings under Civil Code Sections 3491 and 3494, and Civil Procedure Code Section 731, naming them as defendants in an action to abate the same, and to seek restitution for the costs of abatement, including:

(1) investigative costs;

(2) Court costs;

(3) reasonable attorney's fees arising out of preparations for and trial of the cause, and appeals therefrom; and

(4) printing costs of trial and appellate briefs and all other papers filed in such proceedings.

B. All positive prints of the abovedescribed 26 lewd films and previews are considered to be contraband and the subject of forfeitures as provided for in Section 12-104 (G)(3) of the Santa Ana Municipal Code.

C. From and after service on the place or its manager, or acting manager, or person then in charge of such place, of a certified copy of Ordinance NS. 1325, and a certified copy of this Resolution, any and all moneys paid thereafter as admission price to the exhibition of such

lewd films are considered to be a public nuisance as personal property used in conducting and maintaining such nuisances, and that a forfeiture of the same and other admission fees will be requested in the judicial proceedings required by Ordinance No. .

Section 8.

A. The City Attorney is hereby ordered to provide for delivery of a certified copy of this Resolution and a certified copy of Ordinance NS 1325 in any manner normally used to effectuate personal service of process as directed in Code of Civil Procedure, Section 415.10 through 416.90 to United Artists Theaters, Inc., Allison Honer Co., a Partnership, and JOHN DOES 1 through 6, and to all other persons of record having any legal or equitable interest in the real property, known as 1565 West 17th Street, Santa Ana, California,

on which is located the motion picture business commonly known as the "Mitchell Brothers' Santa Ana Theater", and to the manager or acting manager or persons in charge of said establishment.

B. The City Attorney is hereby ordered to proceed as directed in Section 12-105 of the Santa Ana Municipal Code, and to take all steps and do all things necessary to abate such nuisances and obtain the relief designated therein, through the judicial proceedings specified therein.

ADOPTED this 26th day of October, 1976, by the following vote:

AYES,	COUNCILMEN:	Yamamoto, Brandt, Ortiz, Ward
NOES,	COUNCILMEN:	None
ABSENT,	COUNCILMEN:	Bricken, Evans

ABSTAINED, COUNCILMEN: Garthe

ATTEST: /s/ John Garthe

MAYOR

/s/ Florence I. Malone

CLERK OF THE COUNCIL

APPROVED AS TO FORM:

/s/ Keith L. Gow

KEITH L. GOW

CITY ATTORNEY

THE FOREGOING INSTRUMENT IS A FULL, TRUE, AND CORRECT COPY OF THE ORIGINAL ON FILE IN THIS OFFICE.

ATTEST: Nov. 2 1976

FLORENCE I. MALONE,

CLERK OF THE COUNCIL,

CITY OF SANTA ANA

(SEAL)

FLORENCE I. MALONE

BY /s/ MARTHA E. LEA

DEPUTY

PROGRAM		FEATURE	DATE
1	1)	Sodom & Gomorrah	11/28/75
	2)	Behind the Green Door	11/29/75
	3)	Resurrection of Eve	
2	1)	Anyone But My Husband	1/22/76
	2)	Previews: "The Milk Lady" "Beneath the Mermaids"	
	3)	"Lady on the Couch"	
3	1)	Inside Marilyn Chambers	1/28/76
	2)	Previews	
	3)	The Fireworks Woman	
4	1)	Mash'd	2/24/76
	2)	Previews	
	3)	Sexteen	
5	1)	The Milk Lady	3/10/76
	2)	Previews: "Story of	

		Joanna" "Summer of Laura"	
	3)	The Milk Maid	
6	1)	Beneath the Mermaids	3/23/76
	2)	Previews: "Story of Joanna" "Summer of Laura" "Sip of Wine"	
	3)	A Touch of Genie	
7	1)	"The Story of Joanna"	4/03/76
	2)	Previews: "Sip the Wine" and "Carnal Heaven"	
	3)	Short Feature "Tattoo"	
	4)	Previews: "C.B. Momma"	
8	1)	Previews "Defiance"	6/02/76
	2)	Sip the Wine"	
	3)	"Teenage Fantasies"	

9	1)	Previews: "Carnal Heaven"	6/08/76
	2)	Honeymoon Sweet	
	3)	The Defiance	
10	1)	"Carnal Heaven"	6/21/76
	2)	Previews	
	3)	"Love, Lust & Violence"	
11	1)	Coming atts: "Bang, Bang"	7/06/76
	2)	"The Summer of Laura"	
	3)	"Anyone But My Husband"	
12	1)	Married Woman	8/16/76
	2)	One of a Kind	
13	1)	Autobiography of a Flea (Only Feature)	9/05/76

(ENCLOSURE A-1)

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

PEOPLE OF THE STATE OF CALIFORNIA ex rel. KEITH GOW, CITY ATTORNEY OF THE CITY OF SANTA ANA, CALIFORNIA,

Plaintiff,

vs.

MITCHELL BROTHERS' SANTA ANA THEATER, located at 1565 West 17th Street, Santa Ana, County of Orange, California; M.B.F.G. THEATRE CIRCUIT, INC.; JIM GISH; ALLISON HONER CO., a Partnership; UNITED ARTISTS THEATRE CIRCUIT, INC.; CONTINENTAL AUXILIARY COMPANY, a California Corporation; BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a National Banking Association; JAMES MITCHELL; ARTIE MITCHELL; DEMICH, INC., a California

No. 25-65-30

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FILED
June 6, 1978
WILLIAM E. ST JOHN, County Clerk
By _____ Deputy

Corporation; CINEMA 7, INC., a California Corporation; DOES 1 through 100, inclusive,

Defendants.

This action came on regularly for trial on October 11, 1977, in Department 1, extra sessions sitting in Department 18, 37 and 40 of the above-entitled Court, the Honorable Marvin G. Weeks the Judge assigned, Presiding, the Plaintiff appearing by attorney James J. Clancy, and the Defendants appearing by Joseph Rhine, and the Court on October 17, 1977, having ordered a jury trial on the issues of "obscenity", "public nuisance" and "damages", to precede determination of the equitable issues of imposition of a constructive trust on Defendants' box office receipts, revocation of Defendants' business license and permits, and closure of Defendants' theater; and a jury of twelve persons having been

regularly impaneled and sworn to try the issues of "obscenity", "public nuisance" and "damages", and having heretofore returned his verdicts on said issues; and thereafter on January 4 and 5, 1978, the Court having heard and considered oral arguments by both counsel on the equitable issues of imposition of a constructive trust on Defendants' box office receipts, revocation of Defendants' business licenses and permits, and closure of Defendants' theater; the Court also having reread and considered applicable portions of Plaintiffs and Defendants' trial briefs pertaining to these issues and the Court having granted leave to both counsels to submit written arguments and supplemental points and authorities on the issues; and the Court having received, read, and considered said written arguments, and points and authorities, and the matter having been

duly submitted to the Court for its decision; and the Court having heretofore filed its Memorandum of Opinion; and Plaintiff having requested written Findings of Fact and Conclusion of Law and has heretofore prepared and served and filed said proposed Findings and Conclusions; and the Defendants having duly filed objections thereto; and the matter having been set for hearing to settle said Findings and Conclusions; and said hearing having been had and the Court having settled said Findings and Conclusions now makes its Final Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT

IT IS TRUE THAT:

I.

Pursuant to Plaintiff's motion Defendant Jim Gish has been dismissed as a

party to this action.

II.

Pursuant to written stipulation by and between the Plaintiff and the Defendants Allison Honer Company, a Partnership; Continental Auxiliary Company, a California Corporation; Bank of America National Trust and Savings Association, a National Banking Association; and United Artists Theatre Circuit, Inc.; a Maryland Corporation it was agreed that the above-mentioned Defendants need not appear and defend the cause of action herein which was originally set for trial on June 6, 1977; and that any judgment rendered against any Defendant other than those mentioned above would be without prejudice to the above-mentioned Defendants and would have no binding force or effect upon the cause of action which Plaintiff has alleged against the above-mentioned Defendants.

III.

The Defendants have admitted that in December of 1974 Defendants M.B.F.G. Theatre Circuit, Inc., a California Corporation, and Demich, Inc., a California Corporation, merged into the Defendant Cinema 7, Inc., a California Corporation, to form one corporate entity bearing the name Cinema 7, Inc., a California Corporation.

IV.

Defendant Cinema 7, Inc., is a sublessee of the real property commonly known as "Mitchell Brothers' Santa Ana Theater".

V.

Defendants James Mitchell and Defendant Artie Mitchell, were at all times relevant to this action, the sole owners of Defendant Corporation Cinema 7, Inc., of which each owns 50% of the stock, and the Defendant general partnership, Mitchell Brothers Film Group, in which said persons are

co-partners, and are beneficially interested in the income, profits and financial successes of said corporation at said general partnership and have dominated, influenced, and controlled the business and affairs of said corporation and said partnership at all times relevant hereto.

VI.

In September of 1975 the Defendants became the operators of the theater located at 1565 West 17th Street, in the City of Santa Ana, California, under a sublease from United Artists Theatre Circuit, Inc. Since taking over operation of the theater Defendants have operated the same as an "adult" theater, specializing in sexually explicit films, and continued to operate it as such under the name "Mitchell Brothers' Santa Ana Theater".

VII.

The Mitchell Brothers' Santa Ana

Theater, a motion picture house, is a commercial venture and a place of public accommodation.

VIII.

On January 5, 1976, the City Council of the City of Santa Ana duly passed and adopted Santa Ana Ordinance No. N.S. 1287. Thereafter, Ordinance No. N.S. 1287 was amended by the City Council of the City of Santa Ana in Ordinance No. N.S. 1325.

IX.

Ordinance No. N.S. 1325 was passed on October 4, 1976, and became effective thirty days thereafter.

X.

On October 26, 1976, the City Council of the City of Santa Ana passed and adopted Resolution No. 76-134.

XI.

Ordinance N.S. 1325 was purportedly passed and adopted as an emergency

ordinance on October 4, 1976 and purportedly adopted as a regular ordinance on October 26, 1976. However, on this issue the Court finds specifically that due to defects in the emergency clause of the Ordinance that the said Ordinance did not become effective until thirty days after October 4, 1976 and the purported act of adopting the said Ordinance as a regular Ordinance on October 26, 1976 had no force or legal effect.

XII.

On November 2, 1976, the within action was filed by the City Attorney for the City of Santa Ana at the direction of the City Council of the City of Santa Ana under Ordinances No. N.S. 1287, N.S. 1325 and Code of Civil Procedure Section 731. The Complaint and certified copies of Ordinance No. N.S. 1287, N.S. 1325 and Resolution No. 76-134 were duly served on the Defendants in November, 1976.

XIII.

The time-motion studies of the 26 motion picture films and previews which were examined by the Santa Ana City Council pursuant to its purported action in Council Resolution 76-134 or the same time and motion studies which were admitted in evidence in the trial court as Plaintiff's Exhibit 2A - 14, inclusive, and also appear in photographically reduced form, as Exhibits 1 - 13 to the first amended and supplemental complaint filed and served on or about June 6, 1977.

XIV.

The following motion picture films and previews, designated as "programs 1-24", were shown, on the following dates and in the following number of days, at the Mitchell Brothers' Santa Ana Theater:

PROGRAM	FEATURE	DATE EXHIBITED	NO. OF DAYS
1	Sodom & Gomorrah	9/03/75-01/15/76	135

PROGRAM	FEATURE	DATE EXHIBITED	NO. OF DAYS
1	Behind the Green Door Resurrection of Eve		
2	Anyone But My Husband Previews: "The Milk Lady, "Beneath the Mermaids" Lady on the Couch	01/16/76-01/22/76	7
3	Inside Marilyn Chambers Previews Fireworks Woman	1/23/76-2/19/76	28
4	Mash'd Previews Sexteen	02/20/76-03/04/76	14
5	The Milk Lady Previews: "Story of Joanna", "Summer of Laura" The Milk Maid	03/05/76-03/18/76	14
6	Beneath the Mermaids Previews:	03/19/76-04/01/76	14

PROGRAM	FEATURE	DATE EXHIBITED	NO. OF DAYS
6	"Story of Joanna", "Summer of Laura", "Sip the Wine" A Touch of Genie		
7	The Story of Joanna Previews: "Sip the Wine", "Carnal Haven" Short Feature "Tattoo" Previews: "C.B. Momma"	04/02/76-05/06/76	35
7(a)	The Milk Lady C.B. Mommas	05/07/76-05/20/76	14
8	Previews: "Defiance" Sip the Wine Teenage Fantasies	05/21/76-06/03/76	14
9	Previews: "Carnal Haven" Honeymoon Sweet The Defiance	06/04/76-06/17/76	14
10	Carnal Haven	06/18/76-07/04/76	17

PROGRAM	FEATURE	DATE EXHIBITED	NO. OF DAYS
10	Previews Love, Lust & Violence		
11	Coming Atts: "Bang, Bang" Summer of Laura Anyone But My Husband	07/05/76- 08/05/76	32
12	Married Woman One of a Kind	08/06/76- 08/31/76	26
13	Autobio- graphy of a Flea (Only Feature)	09/01/76- 10/04/76	34
14	Story of Joanna Autobiography of a Flea	10/04/76- 10/17/76	14
15	Autobio- graphy of a Flea Sodom & Gomorrah	10/18/76- 11/11/76	25
16	Oriental Blue Teenage Nurses	11/12/76- 11/23/76	12
17	Hungry Mouth My Erotic Fantasies	11/24/76- 12/21/76	18
18	Carnal Haven Previews Her Last Fling	12/25/76- 01/18/77	25

PROGRAM	FEATURE	DATE EXHIBITED	NO. OF DAYS
19	Sweet Punkin Love in Strange Places Previews: "Sensations", "Kinkorama", "Code Name", Oriental Treatment" Sweet Punkin, I Love You	01-19-77- 02/01/77	14
20	When A Woman Calls Previews: "Sensations", "Kinkorama", "Code Name", "Oriental Treatment" Night Pleasures	02/02/77- 02/15/77	14
21	Sensations Previews: "Roller-babies", "French Playmates", "Autobiography of a Flea", "Sodom & Gomorrah" Kinkorama Previews: "Candy Lips", "Code Name", "Oriental Treatment", "Teenage Cruisers"	02/16/77- 03/08/77	21
22	French Classmates Previews Roller Babies	03/09/77- 03/15/77	7
23	Sodom & Gomorrah	03/16/77- 03/29/77	14

PROGRAM	FEATURE	DATE EXHIBITED	NO. OF DAYS
23	Previews Autobiography of a Flea		
24	Teenage Cruisers Previews High School Fantasies	03/30/77- 04/12/77	14

XV.

During the course of this trial, the following motion picture films were personally viewed:

(a) Sodom and Gomorrah

(b) Resurrection of Eve

(c) Behind the Green Door

(d) Inside Marilyn Chambers

(e) C.B. Mommas

(f) Autobiography of a Flea

(g) Sensations

(h) Teenage Fantasies

(i) Teenage Cruisers

(j) One of a Kind

(k) Rollerbabies

(l) French Classmates

(m) Love in Strange Places

(n) Hungry Mouth

(o) The Story of Joanna

(p) The Summer of Laura

(q) My Erotic Fantasies

XVI.

Between September 3, 1975 and April 12, 1977 (the dates in issue in this case) Defendants exhibited at their theater described herein, approximately forty-one full-length sexually explicit movie films and additional previews of coming attractions, which were also sexually explicit. The Court personally viewed seventeen of the forty-one films, as well as the twenty-four "time and motion" studies, which were not considered by the jury in the obscenity and nuisance issues, and while the Court does not now rule on the obscene nature of the twenty-four films portrayed in the

"time and motion" studies, it does consider the totality of the evidence and circumstances, in reaching its findings herein.

XVII.

All the film found obscene by the jury and personally viewed by the Court exhibited the basest type of obscenity as it is generally thought of by the average decent, moral person as well as obscenity as defined by law, dominated by oral copulation, sodomy, masturbation, homosexualism, lesbianism, group sex, portrayed incest, and portrayed rape, the licking of sperm from the bodies of the actors, the smearing of sperm on the face. There were, however, no animals involved and no violence. In one picture, an adult actress was portrayed as a child, but generally speaking, no children were involved. As to the twenty four "time and

motion" studies, it would be a restrained description to call them "sexually explicit".

XVIII.

The Defendants are engaged in the commercial exploitation of obscene motion picture film. Illustrative of this fact is that Defendants grossed from the Mitchell Brothers' Santa Ana Theater alone $403,405.75 during the period September 3, 1975 to April 12, 1977.

XIX.

The Court accepts the testimony of Plaintiff's expert Dr. Anchell that the exhibition of obscene films at a neighborhood theater was harmful to the community generally, and the testimony of Plaintiff's expert Dr. Van den Haag that knowledge that obscene films were being exhibited at a neighborhood theater was particularly harmful to persons under the age of twenty-four

whose sexual views had not yet matured, and that such harm did occur in the case due to the close proximity of Santa Ana College, a church and a kindergarten across the street from Defendants' theater and due to the fact Defendants advertise their "adult" movies on a large marquee in the parking lot across from the college.

XX.

Exhibition of the eleven films found obscene herein was made possible by a positive print of the films through which a light source from a motion picture projector is passed and which carries images from such positive print that it projects the same onto the screen of said motion picture theater.

XXI.

Ordinance No. N.S. 1287 passed and adopted on January 5, 1976 contains no provision for license revocation. Ordinance

No. N.S. 1325 which amends N.S. 1287 to include a provision for license revocation did not become effective as an emergency ordinance on October 4, 1976 (see Finding XI above). On October 26, 1976 and pursuant to the purported emergency ordinance or its purported adoption as a regular ordinance Resolution No. 76-134 was adopted purportedly revoking all licenses and permits theretofore issued for the premises known as 1565 West 17th Street, Santa Ana, California, subject to judicial confirmation.

XXII.

Ordinance No. N.S. 1325 contains no expression of retroactive application.

XXIII.

On October 26, 1976, when Resolution No. 76-134 was adopted, the only facts presented to the City Council as justification for the license revocation were alleged acts occuring prior to the effective date

of Ordinance N.S. 1325.

XXIV.

The Defendants and each of them were not guilty of negligence, accident, mistake, undue influence or violation of any trust in their conduct as applicable to the issue of an involuntary constructive trust under Civil Code Section 2224.

XXV.

The Defendants, and each of them, had prior and continuing knowledge of the sexually explicit character of the films, shown at the Mitchell Brothers' Santa Ana Theater, and that said films contained sexual activity in the form of ultimate sexual acts, normal or perverted, actual or simulated, or lewd exhibition of the genitals.

From the foregoing Findings of Fact, the Court concludes as follows:

CONCLUSIONS OF LAW

I.

This action was brought at the direction of the Santa Ana City Council and was authorized by Code of Civil Procedure Section 731.

II.

The City Attorney has standing to bring this action of public nuisance against the Defendants by virtue of Code of Civil Procedure Section 731 and to assert therein the remedy of constructive trust.

III.

The Defendant James Mitchell and the Defendant Artie Mitchell, were at all times relevant to this action, principals and sole owners of the Defendant Corporation Cinema 7, Inc., and the Defendant general partnership, Mitchell Brothers Film Group, and as such general partners are jointly

and severally liable for the acts of such partnership and corporation.

IV.

Based upon the Court's personal viewing, each of the following motion picture films named below constitute subject matter which is obscene beyond a reasonable doubt, as the term "obscene" is defined in Penal Code Section 311(a):

(a) Sodom and Gomorrah

(b) Behind The Green Door

(c) Inside Marilyn Chambers

(d) Autobiography of a Flea

(e) Sensations

(f) Teenage Fantasies

(g) Teenage Cruisers

(h) French Classmates

(i) Love in Strange Places

(j) Story of Joanna

(k) Hungry Mouth

V.

The Mitchell Brothers' Santa Ana Theater is a commercial venture and place of public accommodation, and is subject to regulation by the State.

VI.

The positive prints used to project the images in the obscene films enumerated in Conclusion IV. which have been received in evidence in this case are unlawful subject matter and contraband as to which no property rights may be acquired.

VII.

The following ordinance provisions and City Council's actions taken pursuant thereto, constitute constitutionally prohibited "prior restraints" and "censorship":

N.S. 1287, Section 12-103(c)

N.S. 1325, Section 12-104(c)

N.S. 1287, Section 12-103(d)

N.S. 1325, Section 12-104(e)

N.S. 1287, Section 12-103(f)(3)

N.S. 1325, Section 12-104(g)(3)

VIII.

Chapter 21 of the Santa Ana Municipal Code, under which the Mitchell Brothers' Santa Ana Theater license was issued, is a licensed ordinance which has as its sole purpose the raising of revenue, and is not a regulatory ordinance.

IX.

Since there is no expression of retroactive application in Ordinance No. N.S. 1325 said Ordinance must be given prospective application only.

X.

Construing Ordinance No. N.S. 1325 as being regulatory in nature, the action taken by the City Council pursuant thereto in Resolution No. 76-134 was not predicated upon any conduct occurring after the effective date of Ordinance No. N.S. 1325 and

such action revoking all license issued as part of the operations of the Mitchell Brothers' Santa Ana Theater was not a valid revocation of said license to do business.

XI.

The maintenance of a public nuisance by the showing of an obscene film does not constitute a "wrongful act" as contemplated by the statutes authorizing the imposition of the remedy of constructive trust and Plaintiff is not entitled to the remedy of constructive trust on Defendants' box office receipts.

XII.

The beneficiary of any constructive trust, if imposed in this case, would be the people of the State of California, who suffer loss or harm from the public nuisances which have been created. Said Plaintiff is not a person "who would

otherwise have had it" or an "injured party" as those terms are construed in ascertaining the proper beneficiary of a constructive trust under Civil Code Section 2224.

XIII.

The imposition of a constructive trust on the box office receipts of the eleven films found to be obscene by the jury would constitute double recovery for the same wrong in view of the fact that the jury awarded the Plaintiff compensatory damages in the sum of $76,400.00.

XIV.

No constructive trust lies in this case because (1) there is no conviction of a "wrongful act" which is usually a crime, (2) there is no underlying instrument in existence which would have taken effect except for the imposition of a constructive trust that was not within the

contemplation of the parties to the instrument (3) there is no beneficiary thereof who would be an "injured party" by being a "person who otherwise have had" the proceeds of the trust, which in the case of an obscenity abatement action against a film theater could only be the customers who paid admission, (4) the trust, if any, could only be imposed upon proceeds from films which are shown after they have been adjudged obscene.

XV.

Defendants should be permanently enjoined and restrained from engaging in or performing in Orange County, California, the act of advertising or exhibiting any of the following motion picture films, or any part thereof:

1. Sodom and Gomorrah
2. Behind The Green Door
3. Inside Marilyn Chambers

4. Autobiography of A Flea
5. Sensations
6. Teenage Fantasies
7. Teenage Cruisers
8. Love In Strange Places
9. The Story of Joanna
10. French Classmates
11. Hungry Mouth

XVI.

Under the facts in this case; namely, that the Defendants are engaged in the commercial exploitation of obscene motion picture films and have for a substantial period of time in the past and as a continuing and regular course of conduct exhibited sexually explicit films depicting oral copulation, sodomy, masturbation, homosexuality, lesbianism, group sex, portrayed incest, portrayed rape, the licking of sperm from the bodies of the actors and smearing of sperm on the face,

and have admitted their intention to continue to show the same similarly sexually explicit films in the future, the abatement remedy of closing the defendants' theater for a period of time would otherwise constitute a proper and suitable equitable remedy except for the law expressed in People ex rel. Busch v. Projection Room Theater (1976), 17 Cal. 3d 42, 58 that such closure is prohibited by the Constitution of the United States as a prior restraint.

XVII.

Plaintiff is entitled to further equitable relief; namely, for a period of 24 months from July 1, 1978, Defendants should be ordered to allow officers and employees of the City of Santa Ana free and total access to all parts of the theater and theater premises, upon their request, for the express purpose of monitoring Defendants' compliance with the orders

herein. Further, prior to July 1, 1978, Defendants James Mitchell and Artie Mitchhell should be ordered and directed to deposit the sum of $100,000.00 in trust for the City of Santa Ana at the United California Bank, Santa Ana Main Branch, as a security deposit against future attorney fees, costs, and expenses incurred by the City of Santa Ana, in connection with any further public nuisance action that the City Council may determine to bring against Defendants in connection with the operation of their Mitchell Brothers' Santa Ana Theater. Future lawsuits are defined as any lawsuits filed subsequent to July 1, 1978. Withdrawals from this account to be upon written order of a Judge of the Orange County Superior Court on motion of Plaintiff in said lawsuit, if any, duly supported with evidence in support of the withdrawal, and on the further and express

condition that on the merits, a Judge or jury has previously determined that Defendants maintained a public nuisance by exhibiting an obscene motion picture film at the Mitchell Brothers' Santa Ana Theater and which is involved in said lawsuit. All interest from this account should accrue to the benefit of Defendants. At the expiration of two (2) years from July 1, 1978, in the event that there is a balance remaining in the account and on motion of Defendants, an Orange County Superior Court Judge, upon determination that no public nuisance lawsuits by Plaintiff are then pending against Defendants in the Orange County Superior Court, may order termination of the account, and any balance paid to the Defendants. Defendants should present proof of this deposit with the Court no later than July 10, 1978. Nothing herein is to be construed as a substitute or

alternative to any damages that may be awarded the City by a Judge or Jury.

XVIII.

That at such time as the Judgment herein becomes final, the eleven motion picture films set forth in Conclusion XV above should be destroyed pursuant to Penal Code Section 312, or other applicable law.

Let Judgment be entered accordingly.

DATED: June 6, 1978

Marvin G. Weeks /s/
Marvin G. Weeks, Judge

APPENDIX C

(Reference: Petition at pg. 2-3, 44.)

"Judgment After Trial By Court", filed by Trial Judge Marvin Weeks on June 6, 1978.

.....C-35 thru C-45

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

PEOPLE OF THE STATE OF CALIFORNIA ex rel. KEITH GOW, CITY ATTORNEY OF THE CITY OF SANTA ANA, CALIFORNIA,	
Plaintiff,	No. 25-65-30
vs.	JUDGMENT AFTER TRIAL BY COURT
MITCHELL BROTHERS' SANTA ANA THEATER, located at 1565 West 17th Street, Santa Ana, County of Orange, California; M.B.F.G. THEATRE CIRCUIT, INC.; JIM GISH; ALLISON HONER CO., a Partnership; UNITED ARTISTS THEATRE CIRCUIT, INC.; CONTINENTAL AUXILIARY COMPANY, a California Corporation; BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a National Banking Association; JAMES MITCHELL; ARTIE MITCHELL; DEMICH, INC., a California	FILED June 6, 1978 WILLIAM E. ST JOHN, County Clerk By _____ Deputy

Corporation; CINEMA 7, Inc., a California Corporation; DOES 1 through 100, inclusive,

Defendants.

This action came on regularly for trial on October 11, 1977, in Department 1, extra sessions sitting in Department 18, 37 and 40 of the above-entitled Court, the Honorable Marvin G. Weeks the Judge assigned, Presiding, the Plaintiff appearing by attorney James J. Clancy, and the Defendants appearing by Joseph Rhine, and the Court on October 17, 1977, having ordered a jury trial on the issues of "obscenity", "public nuisance" and "damages", to precede determination of the equitable issues of imposition of a constructive trust on Defendants' box office receipts, revocation of Defendants' business license and permits, and closure of Defendants' theater; and a jury of twelve persons having been

regularly impaneled and sworn to try the issues of "obscenity", "public nuisance" and "damages", and having heretofore returned his verdicts on said issues; and thereafter on January 4 and 5, 1978, the Court having heard and considered oral arguments by both counsel on the equitable issues of imposition of a constructive trust on Defendants' box office receipts, revocation of Defendants' business licenses and permits, and closure of Defendants' theater; the Court also having reread and considered applicable portions of Plaintiff's and Defendants' trial briefs pertaining to these issues; and the Court having granted leave to both counsels to submit written arguments and supplemental points and authorities on the issues; and the Court having received, read, and considered said written arguments, and points and authorities, and the matter having been

duly submitted to the Court for its decision; and the Court having heretofore filed its Amended Memorandum of Opinion; and Plaintiff having requested written Findings of Fact and Conclusions of Law and has heretofore prepared and served and filed said proposed Findings and Conclusions; and the Defendants having duly filed objections thereto; and the matter having been set for hearing to settle said Findings and Conclusions; and said hearing having been had and the Court having settled said Findings and Conclusions and filed its Final Findings of Fact and Conclusions of Law as follows, now renders its Judgment as follows:

IT IS ORDERED, ADJUDGED AND DECREED that Defendants have Judgment on issue of constructive trust. Plaintiff's prayer, request and motion to impose a constructive trust on Defendants' box office receipts

for the period September 3, 1975 to April 12, 1977 is denied.

IT IS ORDERED, ADJUDGED AND DECREED that Defendants have Judgment on the issue of Defendants' license revocation. Plaintiff's prayer, request and motion to confirm and approve the action of the City Council in Resolution 76-134 dated October 26, 1976, revoking all Defendants' licenses and permits is denied.

IT IS ORDERED, ADJUDGED AND DECREED that Defendants have Judgment on the issue of closure of Defendants' Mitchell Brothers' Santa Ana Theatre for one year. The Court finds such a closure is constitutionally impermissible, as constituting a "prior restraint" upon Defendants in violation of the First and Fourteenth Amendments to the United States Constitution. Plaintiff's motion and request is denied.

IT IS ORDERED, ADJUDGED AND DECREED

that Plaintiff have Judgment against the Defendants by way of permanent injunction against Defendants as follows:

A. Defendants, directly or indirectly, are permanently enjoined and restrained from engaging in or performing in Orange County, California, the act of advertising or exhibiting any of the following motion pictures, or any part thereof:

1. Sodom and Gomorrah
2. Behind the Green Door
3. Inside Marilyn Chambers
4. Autobiography of a Flea
5. Sensations
6. Teenage Fantasies
7. Teenage Cruisers
8. Love in Strange Places
9. The Story of Joanna
10. French Classmates

11. Hungry Mouth

B. For a period of 24 months from July 1, 1978, Defendants are ordered to allow officers and employees of the City of Santa Ana free and total access to all parts of the theatre and theatre premises, upon their request, for the express purpose of monitoring the activity and conduct in and around the theatre, as well as monitoring Defendants' compliance with the orders herein.

C. Prior to July 1, 1978, Defendants James Mitchell and Artie Mitchell are ordered and directed to deposit the sum of $100,000.00 in trust for the City of Santa Ana at the United California Bank, Santa Ana Main Branch, as a security deposit against future

attorney fees, costs, and expenses incurred by by the City of Santa Ana, in connection with any further public nuisance action that the City Council may determine to bring against Defendants in connection with the operation of their Mitchell Brothers' Santa Ana Theatre. Future lawsuits are defined as any lawsuits filed subsequent to July 1, 1978. Withdrawals from this account to be upon written order of a Judge of the Orange County Superior Court on motion of Plaintiff in said lawsuit, if any, duly supported with evidence in support of the withdrawal, and on the further and express condition that on the merits, a Judge or jury has previously determined

that Defendants maintained a public nuisance by exhibiting an obscene motion picture film at the Mitchell Brothers' Santa Ana Theatre and which is involved in said lawsuit. It is further ordered that all interest from this account accrue to the benefit of defendants. At the expiration of two (2) years from July 1, 1978, in the event that there is a balance remaining in the account and on motion of Defendants, an Orange County Superior Judge, upon determination that no public nuisance lawsuits by Plaintiff are then pending against Defendants in the Orange County Superior Court, may order termination of the account, and any balance paid to the

Defendants. Defendants are further ordered to present proof of this deposit with the Court no later than July 10, 1978. Nothing herein is to be construed as a substitute or alternative to any damages that may be awarded the City by a Judge or jury. Plaintiff is ordered to provide the Bank with a copy of this Order.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon the Judgment herein becoming final, the following named motion picture film prints declared obscene herein, and now in evidence are ordered destroyed pursuant to Penal Code Section 312, or other applicable law.

IT IS FURTHER ORDERED, ADJUDGED

AND DECREED that Plaintiff recover their costs of suit herein, as allowed by law and as previously determined by the Court in the sum of $ 5,869.31 .

DATED: June 6, 1978

/s/ Marvin G. Weeks
Marvin G. Weeks
Judge (Assigned) of
the Superior Court

APPENDIX D

(Reference: Petition at pg. 7, 32.)

Time and Motion Studies* of the following 6 motion picture films:

Behind the Green Door	D-1 thru D-27
Resurrection of Eve	D-29 thru D-59
Sodom and Gomorrah - The Last Seven Days	D-61 thru D-97
The Autobiography of a Flea	D-99 thru D-133
C.B. Mamas	D-135 thru D-155
Inside Marilyn Chambers	D-157 thru D-185

* A time-motion study is a chronological series of still photographs of a motion picture film, timed in their relative order of appearance, which, by "stopping" the movement appearing on the motion picture screen and recording the same, permits the type of conduct being portrayed thereon to be analyzed in a fair and accurate manner. Photographs have been taken every 3.6 seconds playing time.

APPENDIX D

TIME-MOTION STUDY* OF THE FILM

"BEHIND THE GREEN DOOR"

The motion picture film "Behind the Green Door" was issued a "Certificate of Registration of a Claim to Copyright" by the Copyright Office on April 18, 1973.

* A time-motion study is a chronological series of still photographs of a motion picture film, timed in their relative order of appearance, which, by "stopping" the movement appearing on the motion picture screen and recording the same, permits the type of conduct being portrayed thereon to be analyzed in a fair and accurate manner. Photographs have been taken every 3.6 seconds playing time.

"BEHIND THE GREEN DOOR": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. M.P. 24594) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO JARTECH, INC. (DATE OF ISSUANCE: APRIL 18, 1973).

"BEHIND THE GREEN DOOR"
PART 1 OF 13 PARTS
(0:17-0:24) OPENING SCENE. MALE DRIVING A VEHICLE. (0:30-1:16) SCENE SHIFTS TO INSIDE A ROADSIDE DINER. (1:19-2:13) TWO MALES SEATED IN DINER TALK WITH CHEF AS WAITRESS SERVES THEM. ONE MALE RELATES STORY. (2:15-3:27) A FLASH BACK. A SMALL CONVERTIBLE SPORTS CAR APPEARS WITH GIRL DRIVING ON WINDING ROAD AS FILM CREDITS AND TITLE APPEAR. (3:31-3:45) GIRL ARRIVES AT A RESORT AND IS GREETED BY MAN BEHIND COUNTER. (3:48-5:54) TWO MEN WHO WERE AT DINER ARE SEATED TALKING IN RESORT OPEN DINING AREA. GIRL WHO ARRIVED ENTERS SCENE AND SITS AT TABLE.

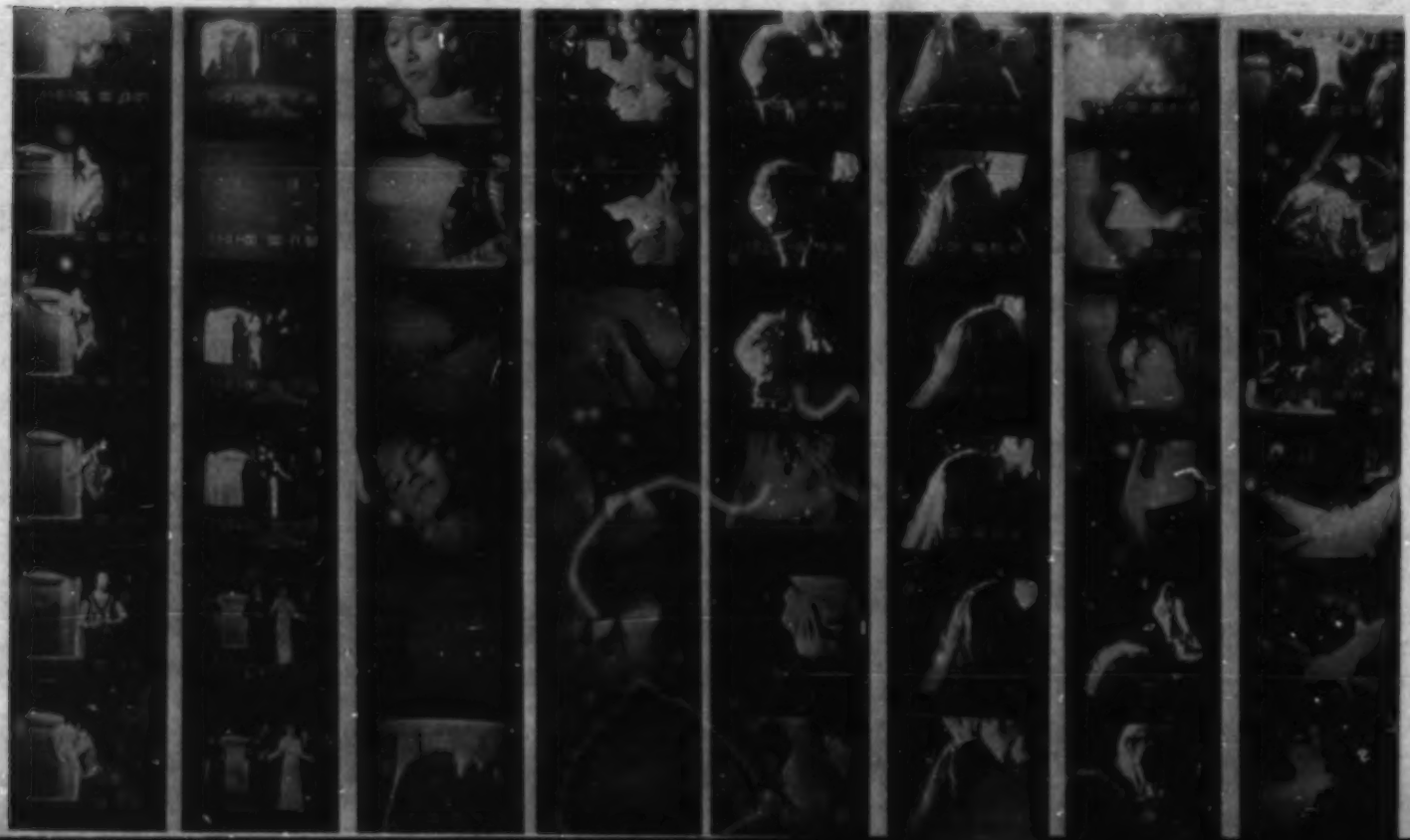
"BEHIND THE GREEN DOOR": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. M.P. 24594) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO JARTECH, INC. (DATE OF ISSUANCE: APRIL 18, 1973).

"BEHIND THE GREEN DOOR"
PART 2 OF 13 PARTS
(5:56-7:19) TWO MEN CONTINUE TALKING. (7:21-7:46) NIGHT SCENE - WOMAN DESCENDS OUTSIDE STAIR-WAY. AUTO STOPS - MEN GET OUT AND FORCE WOMAN INTO CAR. ONE OF TWO ABDUCTORS RUNS AFTER AUTO SHOUTING "HEY, YOU SON-OF-A-BITCH, STOP!" (7:49-9:37) TWO MEN ENTER LARGE PLUSH-LIKE ROOM OR FOYER OF A NIGHT CLUB AND ARE MET BY LARGE THIRD MAN WHO BURSTS A FOOTBALL WITH BARE-HANDS AFTER ASKING THE TWO MEN THEIR NAMES, PUTS MASKS ON THEM AND ORDERS A WOMAN TO SHOW THEM TO THEIR SEATS. (9:41-10:19) CAMERA PANS INTERIOR OF CLUB. CLOWN IS PERFORMING ON STAGE. (10:23-10:43) AUTO ENTERS ALLEY AND STOPS. TWO MEN AND ABDUCTED WOMAN GET OUT OF AUTO AND ENTER BUILDING. (10:47-11:18) ABDUCTED GIRL IS BROUGHT INTO ROOM WITH ANOTHER WOMAN WHO ORDERS THE TWO ABDUCTORS TO LEAVE. (11:22-11:29) SECOND WOMAN TALKS TO ABDUCTED VICTIM.

"BEHIND THE GREEN DOOR": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. M.P. 24594) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO JARTECH, INC. (DATE OF ISSUANCE: APRIL 18, 1973).

"BEHIND THE GREEN DOOR"
PART 3 OF 13 PARTS
(11:32-15:22) WOMAN CONTINUES TO CALM AND SOOTHE THE FEMALE VICTIM BY TALKING TO HER AND FONDLING HER. (15.26-17:03) CLOWN PERFORMING IN PANTOMIME AS AUDIENCE WATCHES.

"BEHIND THE GREEN DOOR": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. M.P. 24594) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO JARTECH, INC. (DATE OF ISSUANCE: APRIL 18, 1973).



"BEHIND THE GREEN DOOR"
PART 4 OF 13 PARTS
(17:07-18:24) SPOTLIGHT FOCUSES ON GREEN DOOR, WHICH OPENS. ABDUCTED GIRL IS LED OUT BY SEVERAL MEN IN ROBES TO CENTER STAGE. (18:24-22:14) GIRL IS DISROBED BY OTHER WOMEN AND FONDLED AND KISSED AS AUDIENCE WATCHES. (22:17-22:31) GIRL IS RESTRAINED BY SEVERAL WOMEN AS ANOTHER WOMAN PERFORMS CUNNILINGUS ON HER. (22:35-22:46) CAMERA SHIFTS FROM VICTIM TO AUDIENCE AND BACK SHOWING AUDIENCE REACTION.

"BEHIND THE GREEN DOOR": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. M.P. 24594) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO JARTECH, INC. (DATE OF ISSUANCE: APRIL 18, 1973).

"BEHIND THE GREEN DOOR"
PART 5 OF 13 PARTS
(22:49-26:35) AUDIENCE CONTINUES TO WATCH AS GIRL VICTIM IS HELD SPREAD EAGLED ON HER BACK ON STAGE FLOOR AS SEVERAL OTHER FEMALES KISS AND SUCK HER BREASTS AND ANOTHER FEMALE PERFORMS CUNNILINGUS ON HER. (26:39-28:20) BLACK MALE ENTERS STAGE WITH PENIS EXPOSED THROUGH PANTS WITH CUTOUT, AND APPROACHES RESTRAINED VICTIM ON FLOOR. OTHER WOMEN DIRECT MALE TO VICTIM'S VAGINA.

"BEHIND THE GREEN DOOR": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. M.P. 24594) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO JARTECH, INC. (DATE OF ISSUANCE: APRIL 18, 1973).

"BEHIND THE GREEN DOOR"
PART 6 OF 13 PARTS
(28:24-29:16) WOMEN HOLD VICTIM ON FLOOR AS MALE PERFORMS CUNNILINGUS ON HER AS AUDIENCE WATCHES.
(29:19-33:54) CLOSEUP OF MALE PENIS ENTERING VAGINA OF VICTIM. MALE PERFORMS SEXUAL INTERCOURSE WHILE FEMALE WRITHES ON FLOOR STILL HELD BY OTHER FEMALES.

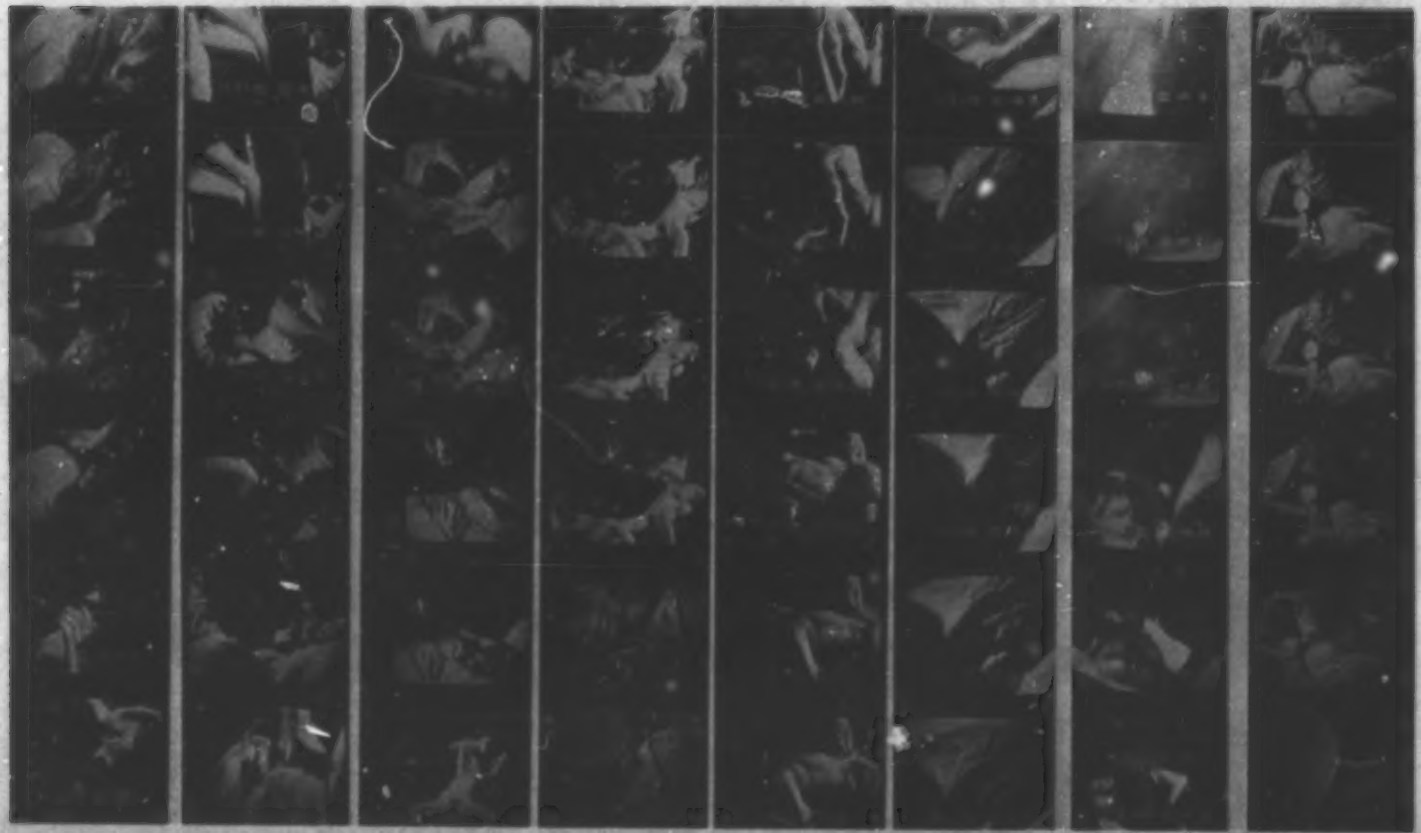
"BEHIND THE GREEN DOOR": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. M.P. 24594) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO JARTECH, INC. (DATE OF ISSUANCE: APRIL 18, 1973).

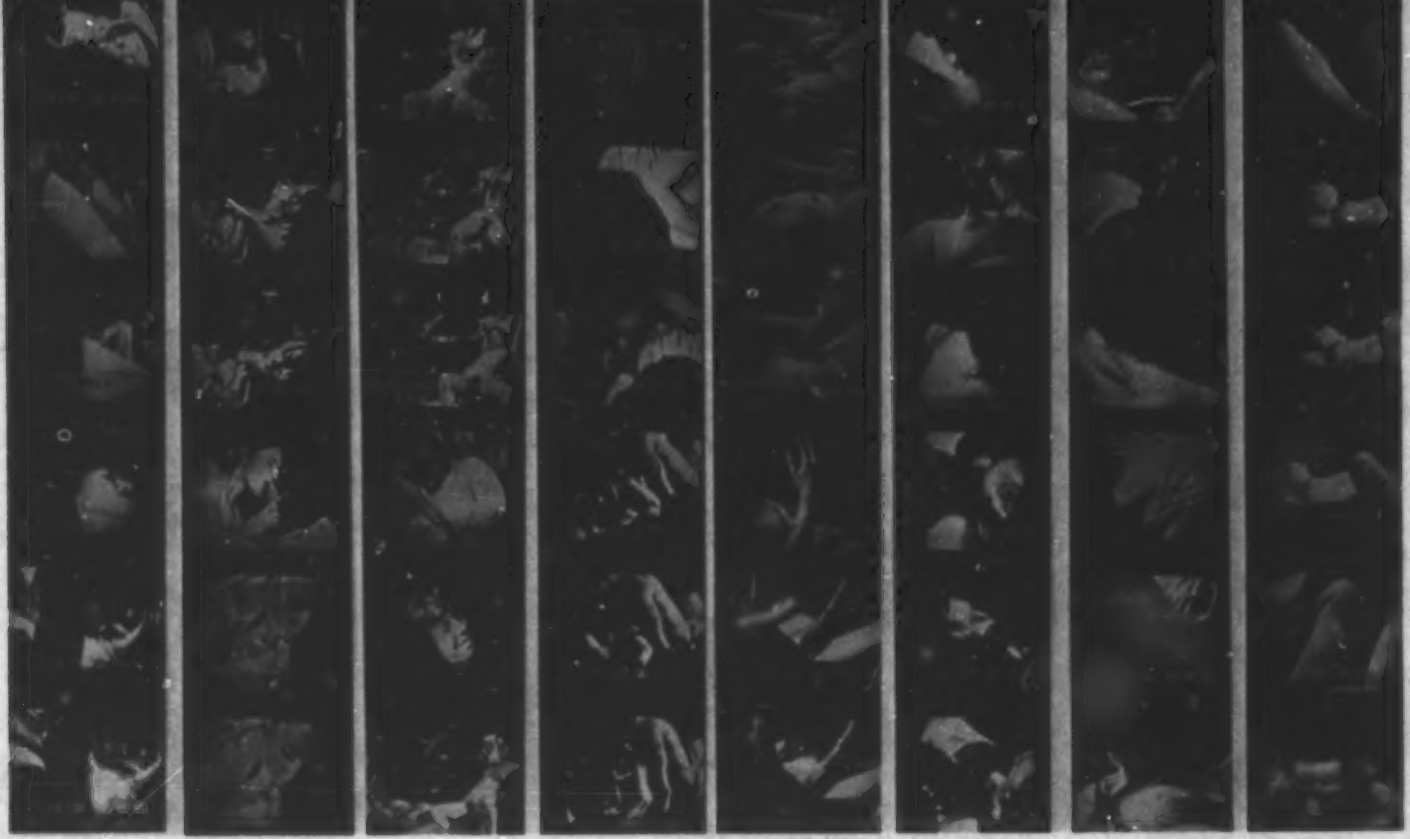
"BEHIND THE GREEN DOOR"
PART 7 OF 13 PARTS
(33:59-36:42) MALE PERFORMS SEXUAL INTERCOURSE TO RHYTHM OF BONGO DRUMS BRINGING VICTIM TO CLIMAX. (36:45-36:56) CAMERA SHOWS AUDIENCE REACTION -- ONE WOMAN MASTURBATES. (36:59-37:44) BLACK MALE EXITS STAGE. AUDIENCE ANTICIPATES NEXT ACT. (37:48-39:22) THREE MAN TRAPEZE DEVICE IS LOWERED FROM CEILING. THREE MEN MOUNT IT WITH PENISES EXPOSED. (39:29) CLOSEUP OF A WOMAN IN AUDIENCE MASTURBATING WITH HER FINGERS WHILE VIEWING STAGE ACTIVITY.

"BEHIND THE GREEN DOOR": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. M.P. 24594) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO JARTECH, INC. (DATE OF ISSUANCE: APRIL 18, 1973).

"BEHIND THE GREEN DOOR"
PART 8 OF 13 PARTS
(39:53-41:45) VICTIM IS TAKEN TO CENTER OF TRAPEZE WITH THREE MALES. SHE THEN MASTURBATES TWO MALES WHILE ALSO PERFORMING FELLATIO ON THIRD MALE. (41:48-41:59) ANOTHER FEMALE IN AUDIENCE FONDLES HER OWN BREAST AS SHE VIEWS STAGE. (42:02-45:03) VICTIM CONTINUES TO MASTURBATE TWO MALES WHILE PERFORMING FELLATIO ON THIRD MALE. WHILE FOURTH MALE PERFORMS SEXUAL INTERCOURSE ON HER FROM BENEATH HER. AUDIENCE ENGAGES IN SEXUAL ACTIVITY.

"BEHIND THE GREEN DOOR": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. M.P. 24594) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO JARTECH, INC. (DATE OF ISSUANCE: APRIL 18, 1973).





"BEHIND THE GREEN DOOR"
PART 9 OF 13 PARTS
(45:07-47:50) SEXUAL INTERCOURSE - CUNNILINGUS. (47:54-50:38) AUDIENCE ENGAGES IN SEXUAL ACTIVITY. MASTURBATION, CUNNILINGUS, FELLATIO, GROUP ORGY.

"BEHIND THE GREEN DOOR": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. M.P. 24594) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO JARTECH, INC. (DATE OF ISSUANCE: APRIL 18, 1973).

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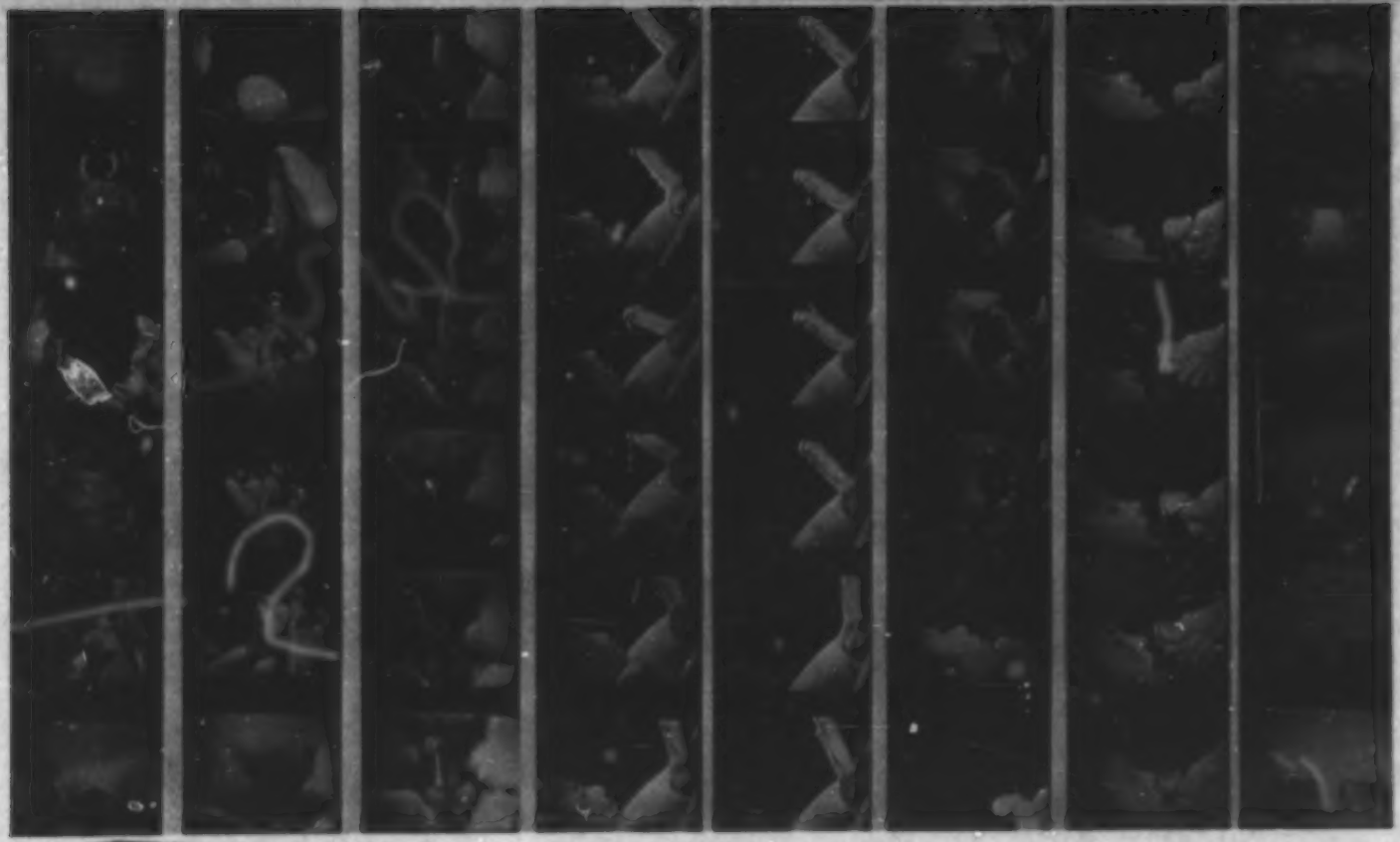
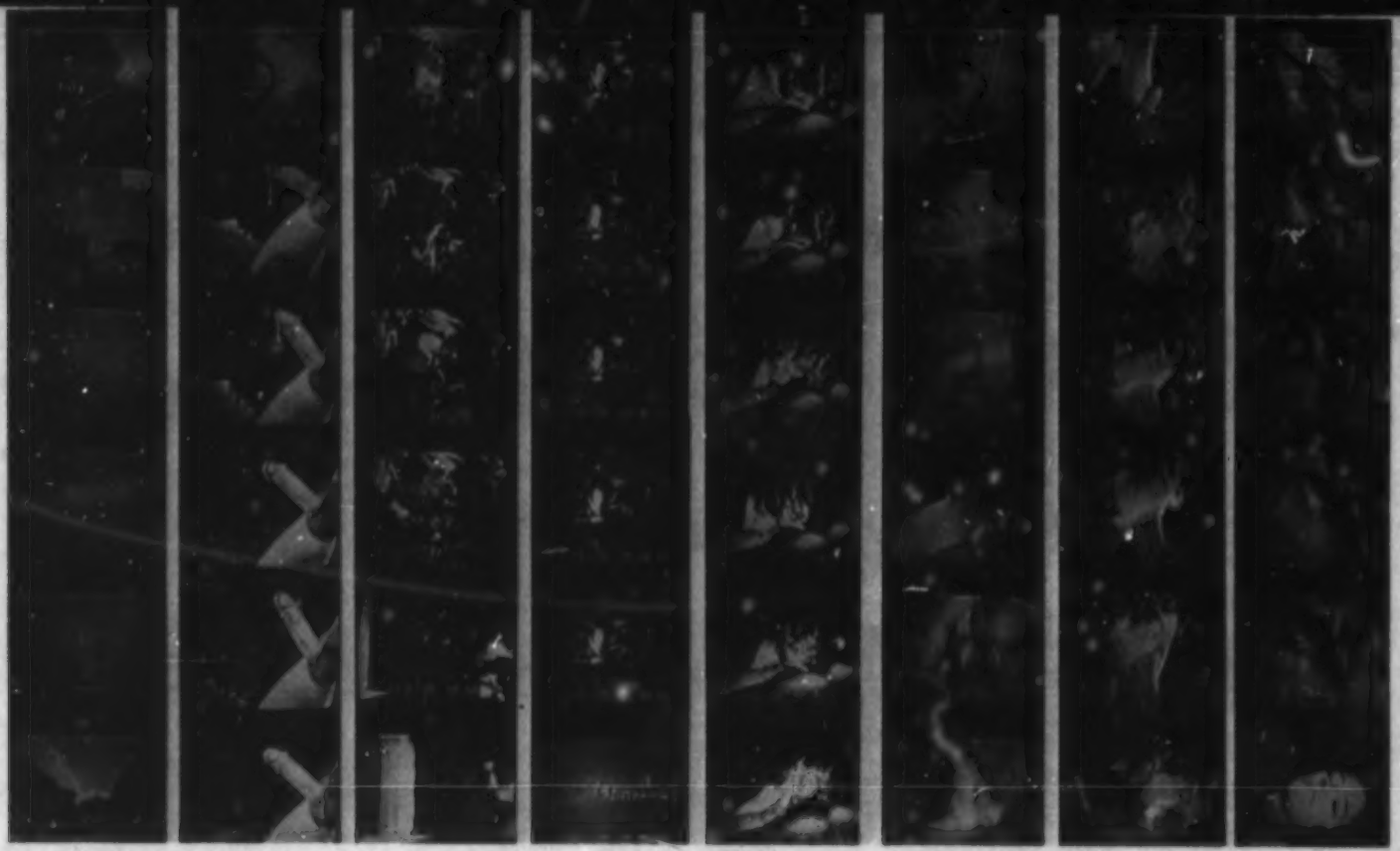


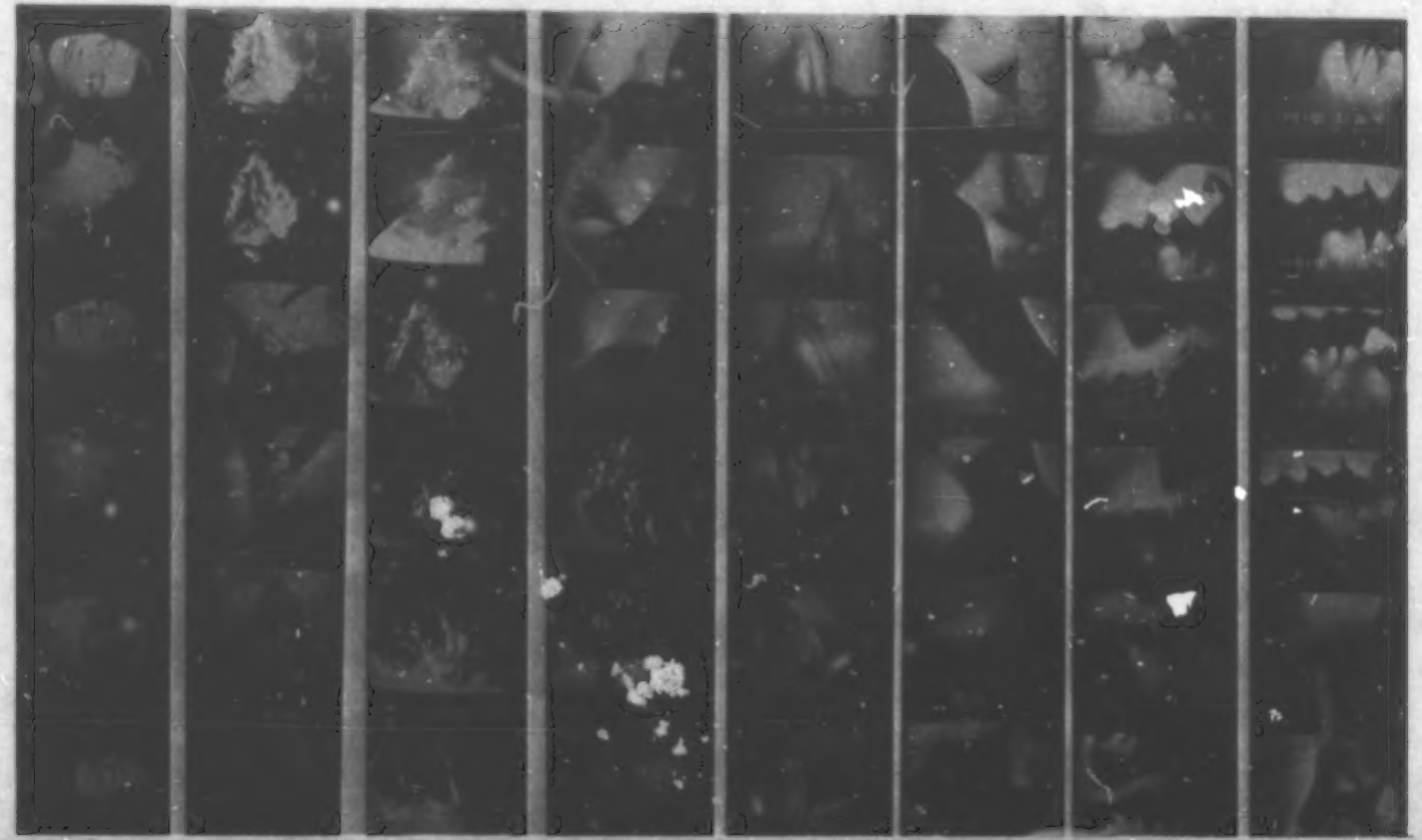
"BEHIND THE GREEN DOOR"
PART 10 OF 13 PARTS
(50:41-51:02) BLACK MALE PERFORMS SEXUAL INTERCOURSE ON GIRL VICTIM THEN MASTURBATES HER VAGINA. (51:05-52:05) FELLATIO, CUNNILINGUS, SEX ORGY CONTINUES. (52:08-52:50) CLOSEUP OF SEXUAL INTERCOURSE, PENIS EJACULATES ON FEMALE PUBIC HAIR. (52:54-56:12) FEMALE PLACES FACE BENEATH PENIS AS IT EJACULATES. SEMEN DRIPS ON FEMALE VICTIM'S MOUTH AND THROAT. SHE THEN LICKS SEMEN FROM BLACK PENIS. MALE THEN RUBS SEMEN FROM PENIS ON FEMALE'S NOSE AND MOUTH.

"BEHIND THE GREEN DOOR": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. M.P. 24594) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO JARTECH, INC. (DATE OF ISSUANCE: APRIL 18, 1973).



"BEHIND THE GREEN DOOR"
PART 11 OF 13 PARTS
(56:15-57:56) SPECIAL EFFECTS PHOTOGRAPHY - PENIS EJACULATES AND SEMEN POURS INTO FEMALE'S MOUTH, FEMALE PERFORMS ORAL SODOMY ON BLACK PENIS AND LICKS SEMEN OFF. (58:00-58:17) ORGY CONTINUES AND THEN VICTIM IS CARRIED OFF STAGE. (58:20-59:13) STORY RETURNS TO TWO MEN AT DINER RECOUNTING STORY. (59:16-101:22) CLOSEUP OF FEMALE PERFORMING FELLATIO. (101:25-101:46) CUNNILINGUS.

"BEHIND THE GREEN DOOR": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. M.P. 24594) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO JARTECH, INC. (DATE OF ISSUANCE: APRIL 18, 1973).



"BEHIND THE GREEN DOOR"
PART 12 OF 13 PARTS
(Þ01:50-Þ02:26) CLOSEUP OF MALE PERFORMING CUNNILINGUS ON VAGINA. (Þ02:28-Þ07:20) FEMALE MOUNTS MALE IN SEXUAL INTERCOURSE, CLOSEUP OF PENETRATION. MALE THEN MOUNTS FEMALE IN SEXUAL INTERCOURSE.

"BEHIND THE GREEN DOOR": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. M.P. 24594) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO JARTECH, INC. (DATE OF ISSUANCE: APRIL 18, 1973).

"BEHIND THE GREEN DOOR"
PART 13 OF 13 PARTS
(E07:24-E09:50) MALE AND FEMALE IN SEXUAL INTERCOURSE TO END - MALE SUPERIOR.

APPENDIX D

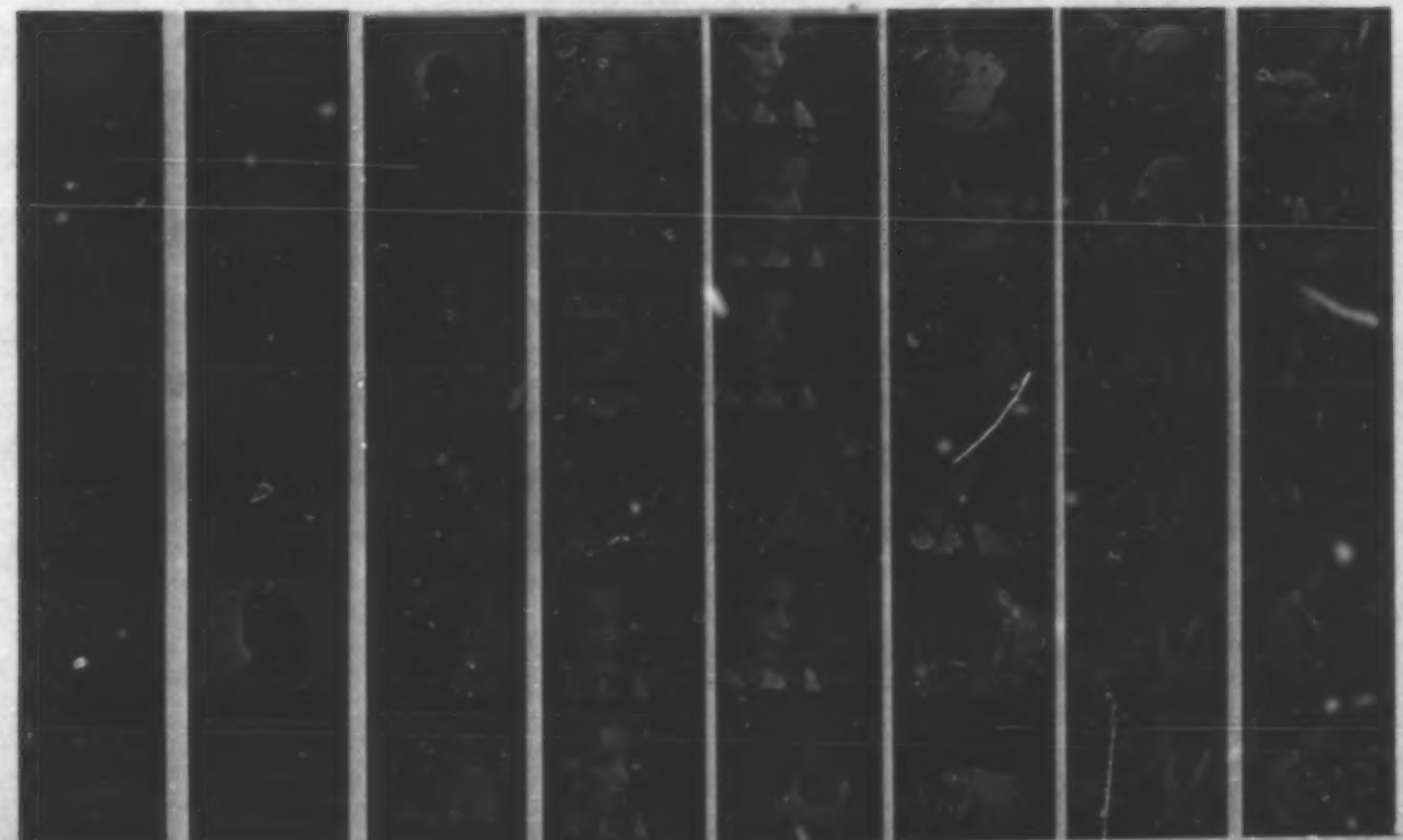
TIME-MOTION STUDY* OF THE FILM

"RESURRECTION OF EVE"

The motion picture film "Resurrection of Eve" was issued a "Certificate of Registration of a Claim to Copyright" by the Copyright Office on Nov. 10, 1973.

* A time-motion study is a chronological series of still photographs of a motion picture film, timed in their relative order of appearance, which, by "stopping" the movement appearing on the motion picture screen and recording the same, permits the type of conduct being portrayed thereon to be analyzed in a fair and accurate manner. Photographs have been taken every 3.6 seconds playing time.

"RESURRECTION OF EVE": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. M.P. 24595) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO ANATUNA, INC. (DATE OF ISSUANCE: NOV. 10, 1973).



"RESURRECTION OF EVE"
PART 1 OF 15 PARTS
(00:07-00:35) CREDIT AND TITLE. (00:39-01:00) PRODUCER'S PREFACE TO STORY. (01:09-01:35) GIRL AT SEASHORE FACES HORIZON. (01:38-01:49) SAILOR AND GIRL APPEAR. (01:53-02:13) WOMAN AT SEASHORE STILL LOOKING OUT TO SEA. (02:20-03:54) SAILOR TALKS TO YOUNG GIRL IN APARTMENT. TEACHES HER TO KISS WITH HER TONGUE BY USING RAGGEDY ANN DOLL. (03:58-04:36) SAILOR THEN KISSES GIRL. (04:40-04:57) SAILOR SHOWS GIRL ACT OF CUNNILINGUS ON RAGGEDY ANN DOLL. (05:00-05:39) SAILOR LAYS GIRL BACK ON TABLE AND PERFORMS CUNNILINGUS ON HER.

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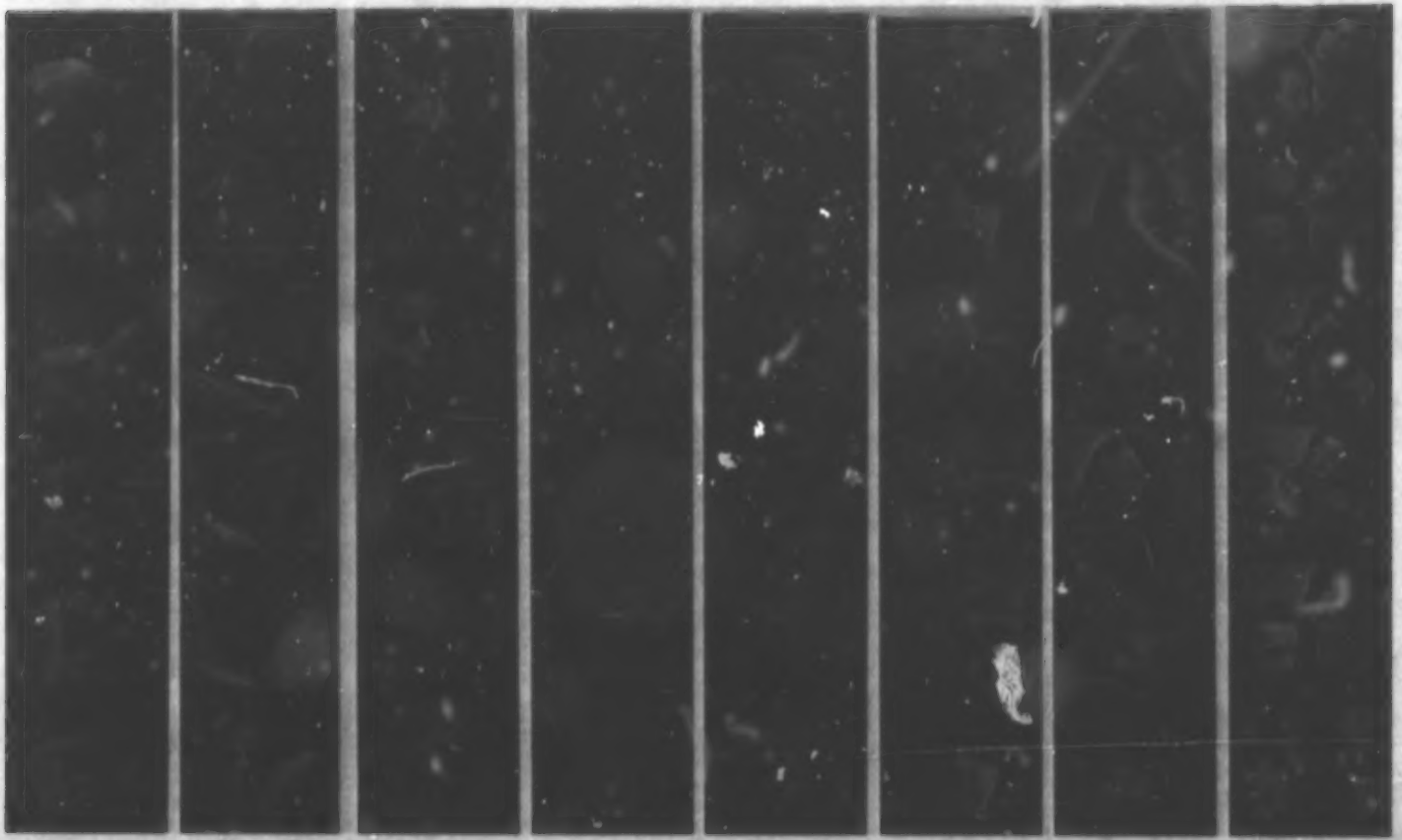

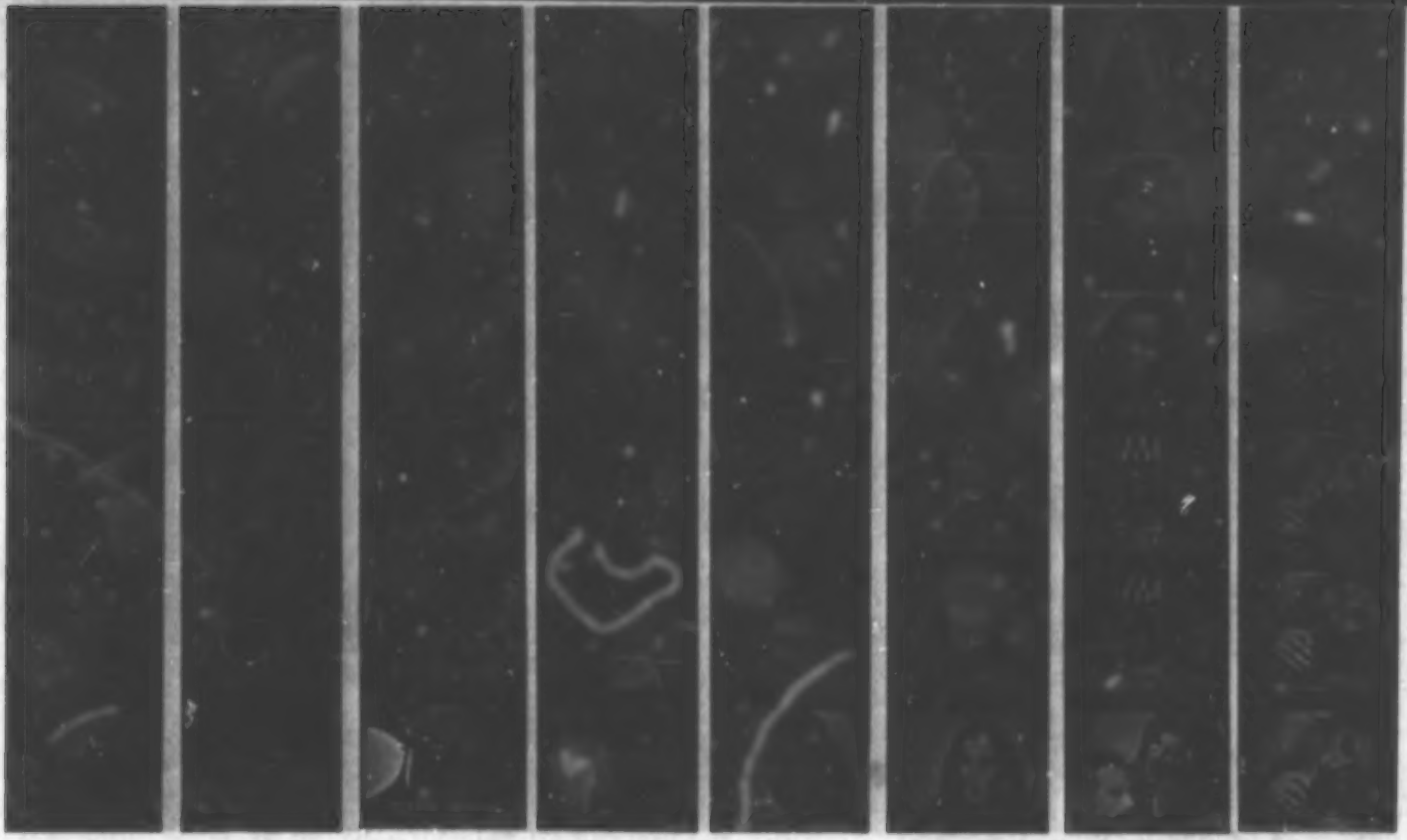

"RESURRECTION OF EVE"
PART 2 OF 15 PARTS
(05:42-06:59) CUNNILINGUS CONTINUES. (07:03-08:16) SAILOR HAS GIRL PERFORM FELLATIO ON HIM. (08:19-08:40) GIRL'S MOTHER APPEARS THROWS SAILOR OUT. (08:44-08:58) FLASHBACK TO WOMAN AT BEACH REMEMBERING. (09:01-09:08) HOSPITAL SCENE. (09:12-09:33) GYM SCENE BLACK FIGHTER AND MANAGER. MALE AND FEMALE AT TABLE. (09:36-11:00) MALE AND FEMALE CONVERSE AT TABLE. (11:03-11:14) FEMALE PERFORMS FELLATIO ON MALE.

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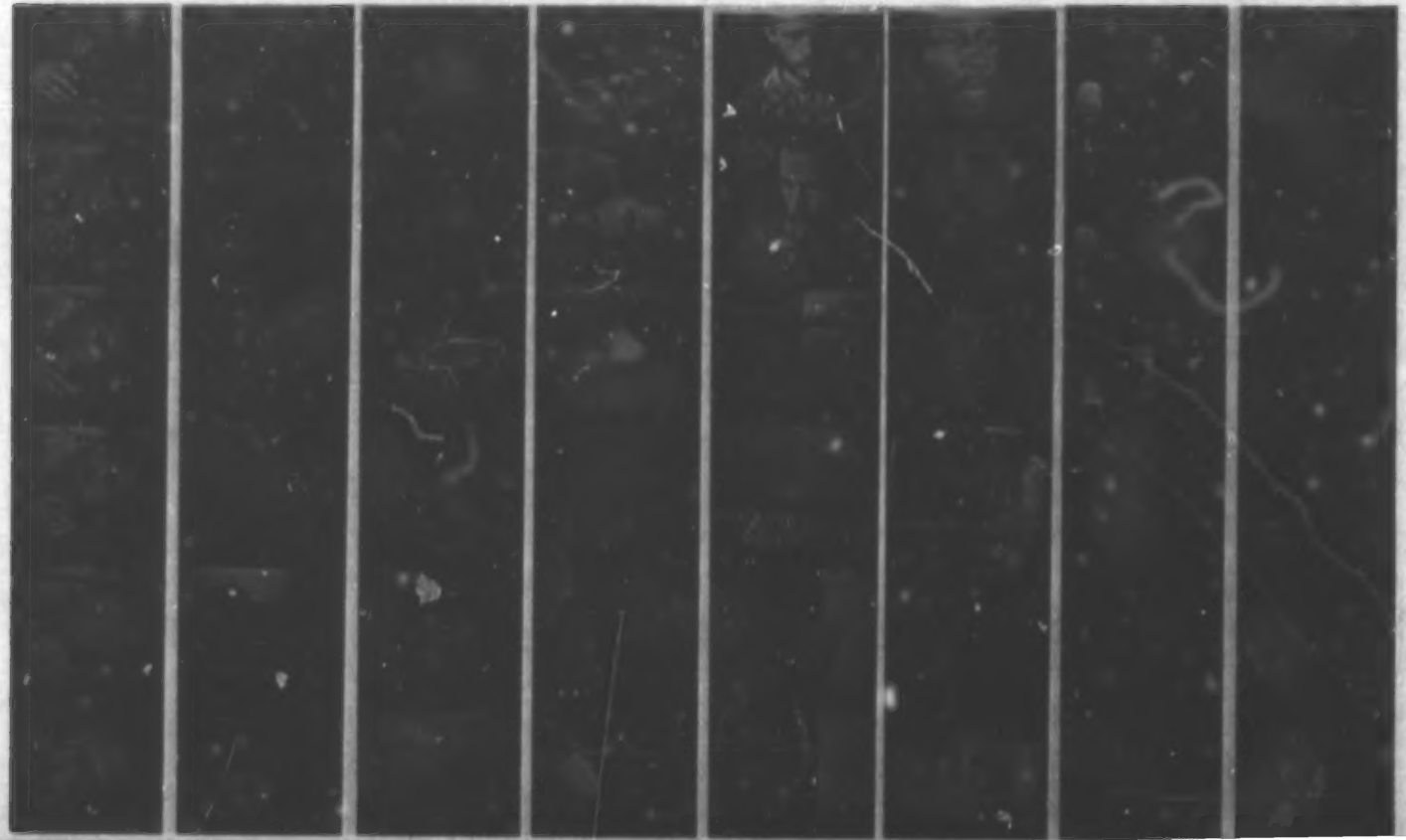

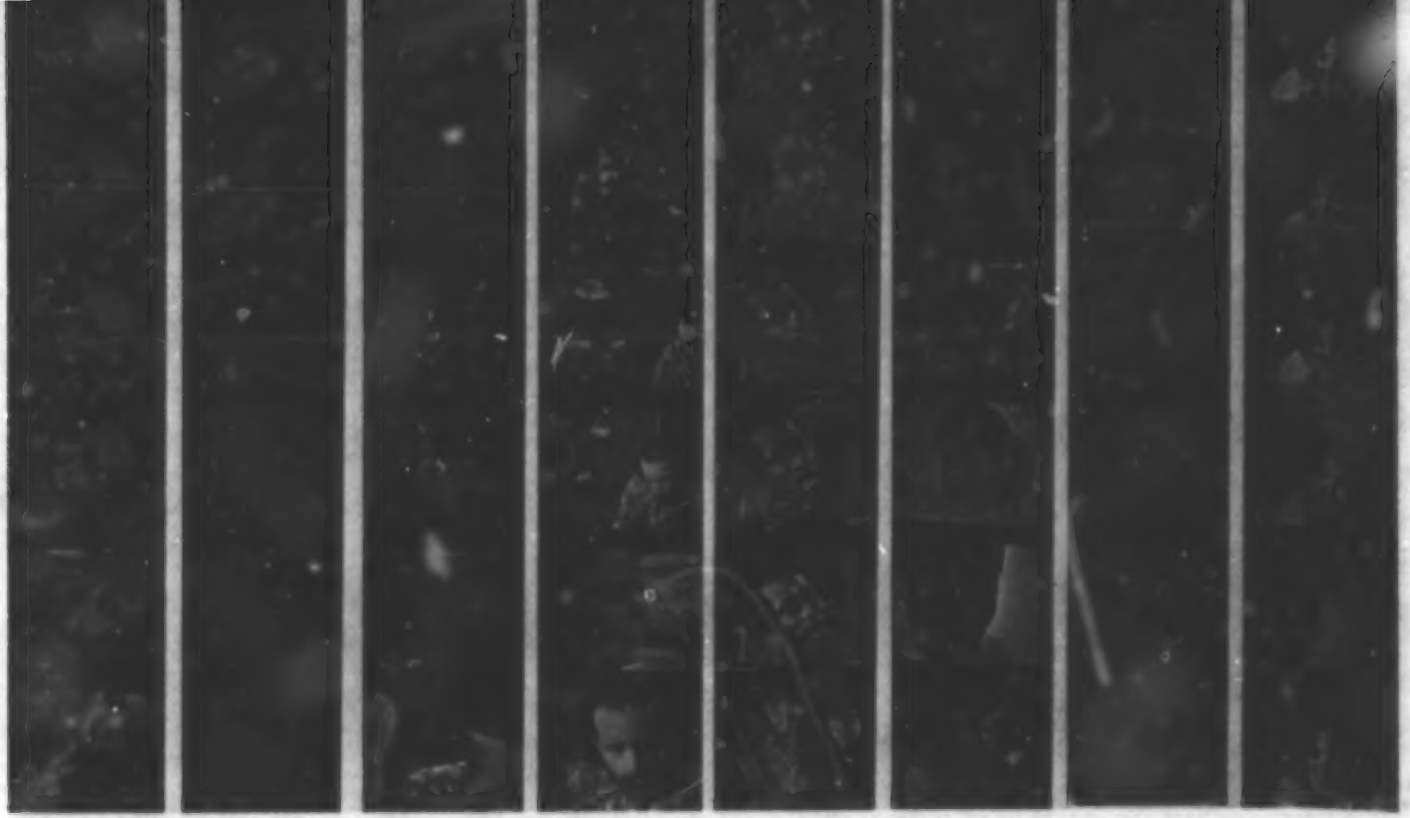

"RESURRECTION OF EVE"
PART 3 OF 15 PARTS
(11:17-12:10) FELLATIO CONTINUES. (12:13-13:39) SEXUAL INTERCOURSE, MALE SUPERIOR. (13:37-14:08) MALE PERFORMS AS DISC JOCKEY ON RADIO. (14:12-14:22) HOSPITAL SCENE; (14:26-14:47) FLASHBACK EVE TALKS TO BLACK FIGHTER (14:50-15:14) FLASHBACK, EVE TALKS TO DISC JOCKEY. (15:18-15:21) HOSPITAL FLASHBACK (15:25-15:49) DISC JOCKEY TELLS GIRLFRIEND THEY ARE THROUGH. (15:53-16:21) HOSPITAL FLASHBACK. (16:24-16:49) MALE ANNOYS FEMALE WHO IS WORKING AT RADIO.

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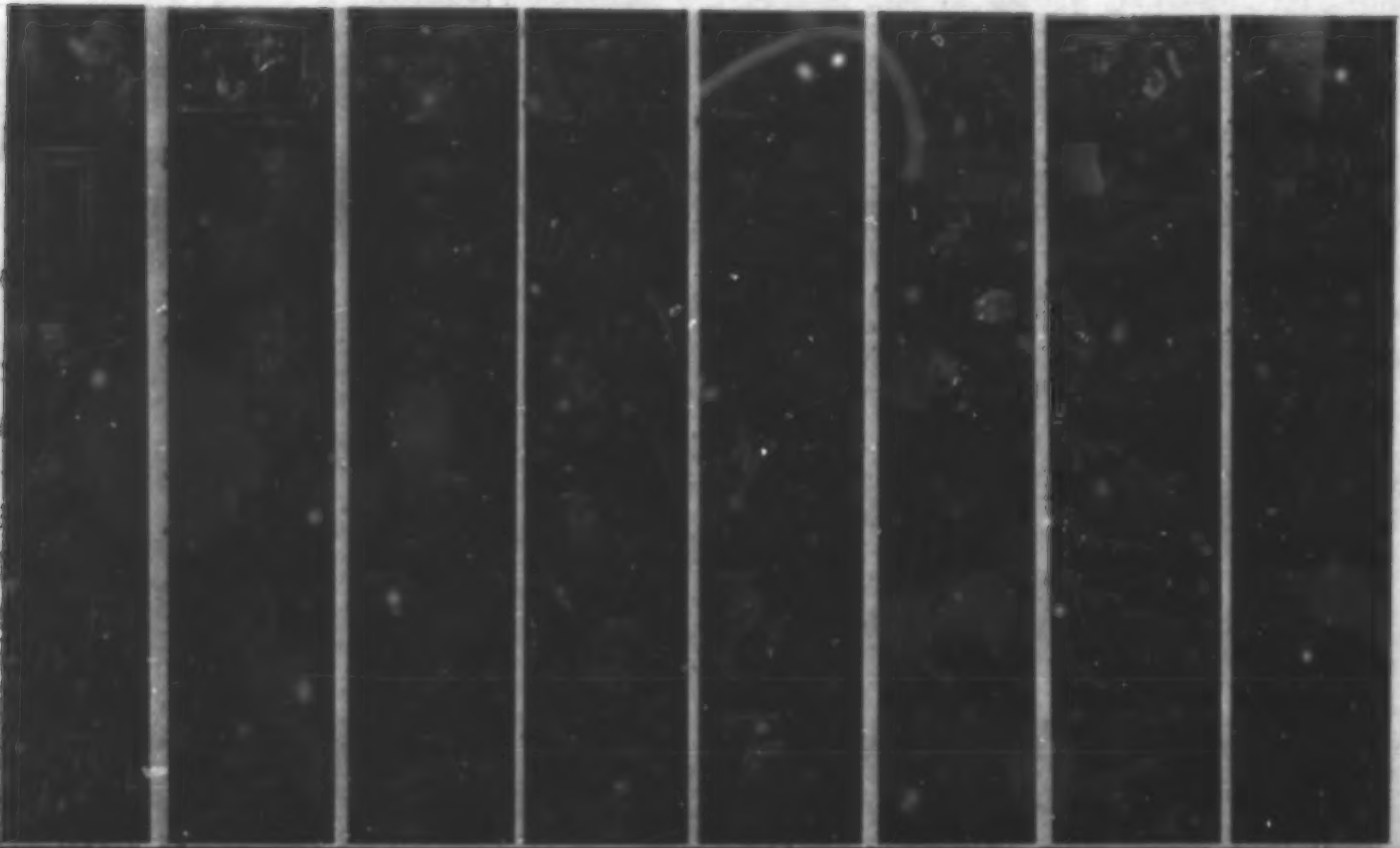
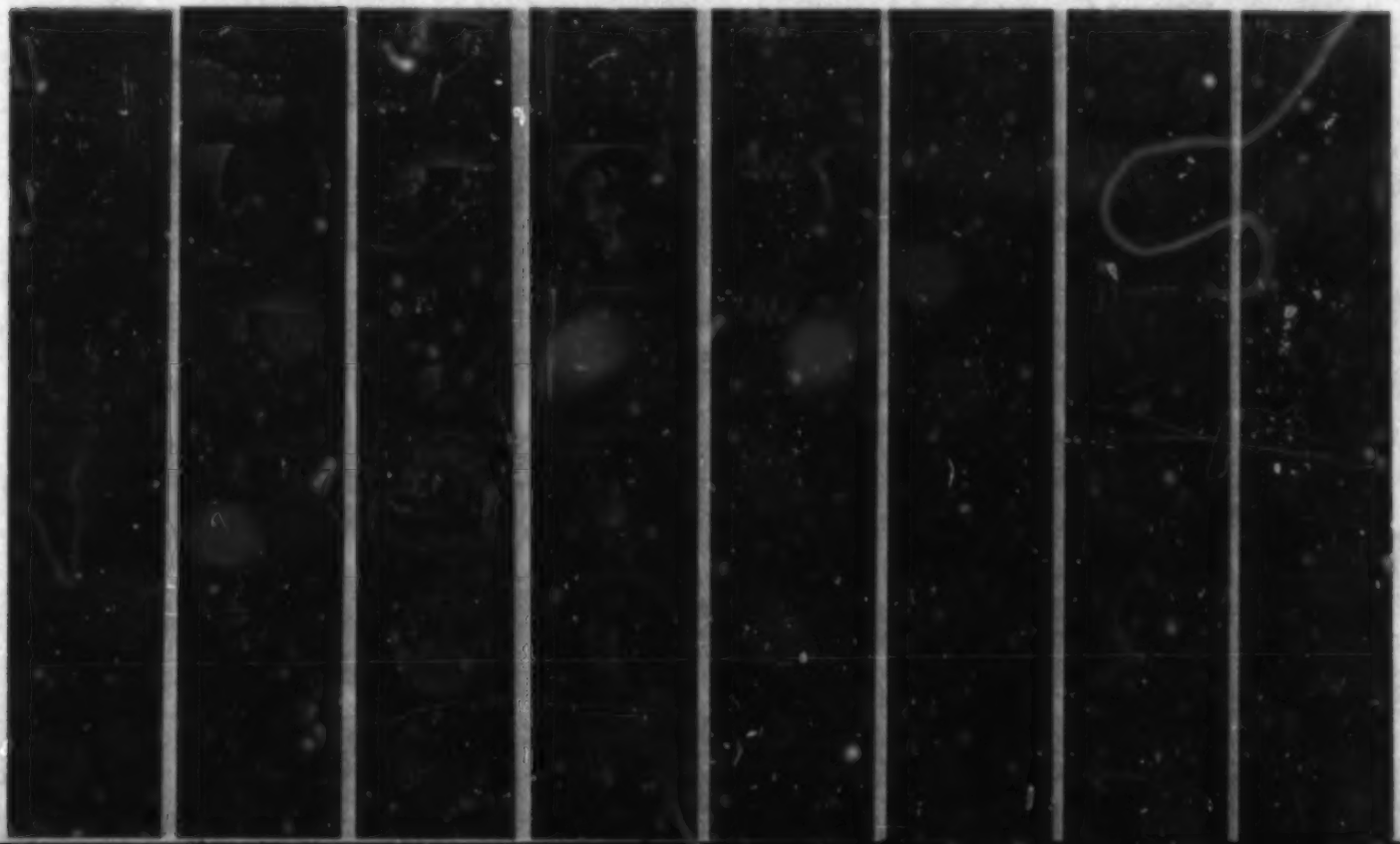
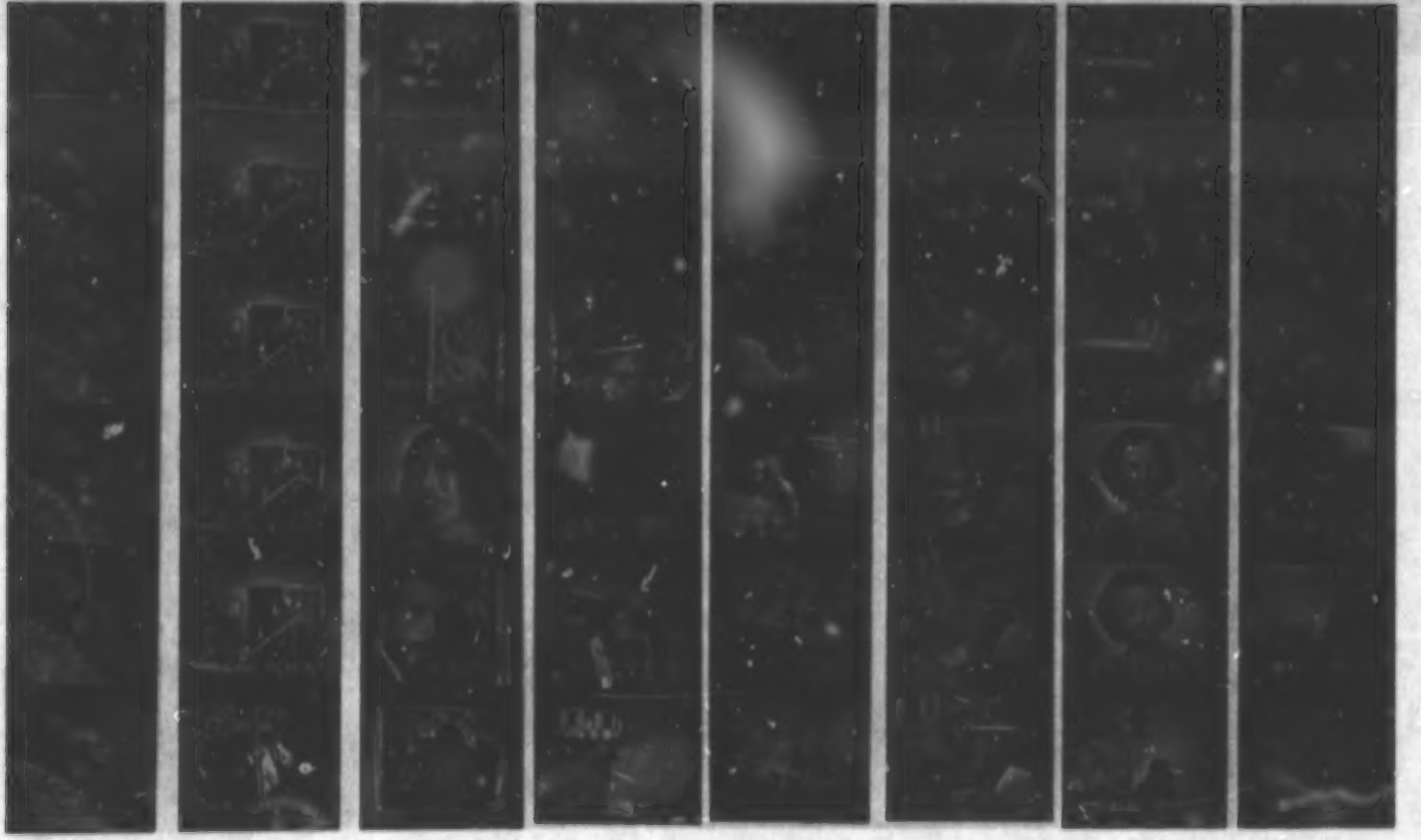


"RESURRECTION OF EVE"
PART 4 OF 15 PARTS
(16:52-17:37) DISC JOCKEY ANNOYS FEMALE WORKING AT RADIO STATION. (17:41-19:22) SEXUAL INTERCOURSE. (19:26-19:36) OUTDOOR SCENE. (19:45-19:47) SEXUAL INTERCOURSE. (19:50-19:57) EVE AND FRANK TALK. (20:00) BLACK FIGHTER SKIPS ROPE. (20:04-20:07) HOSPITAL SCENE EVE'S FACE GROTESQUE AND SCARRED. (20:11-20:18) OUTDOOR BEACH SCENE. (20:25-20:39) FRANK AND EVE TALK AND EMBRACE. (20:42-20:46) SEXUAL ACTIVITY. (20:49-21:03) OUTDOOR PARK SCENE. (21:07-21:35) CLOSEUP OF MALE FACE BETWEEN FEMALE'S LEGS PERFORMING CUNNILINGUS. (21:38-21:42) EVE IN HOSPITAL WITH NURSE. (21:45-21:49) GYM SCENE FIGHTER WORKING OUT. (21:59-22:24) SEXUAL INTERCOURSE MALE SUPERIOR.

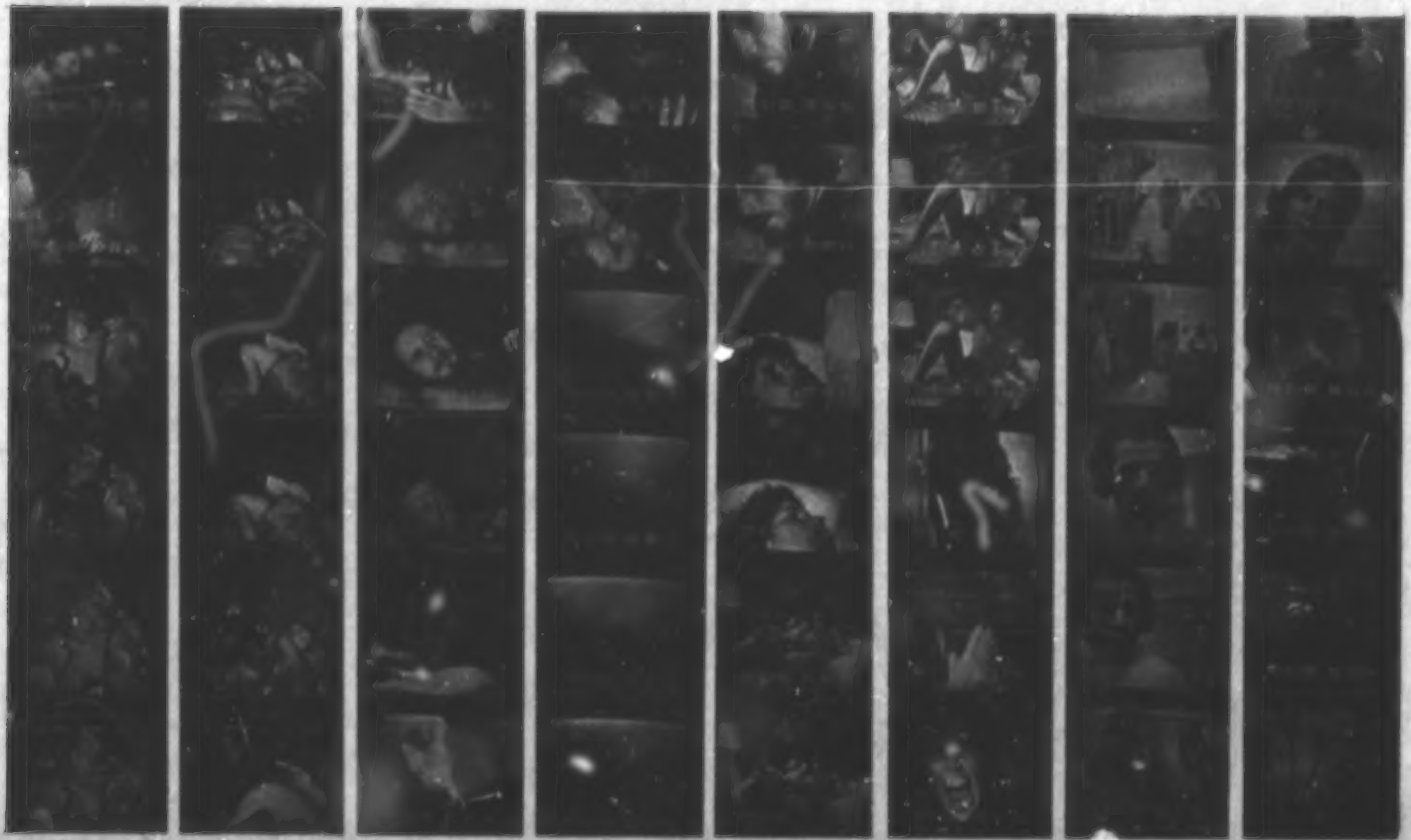
"RESURRECTION OF EVE": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. M.P. 24595) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO ANATUNA, INC. (DATE OF ISSUANCE: NOV. 10, 1973).





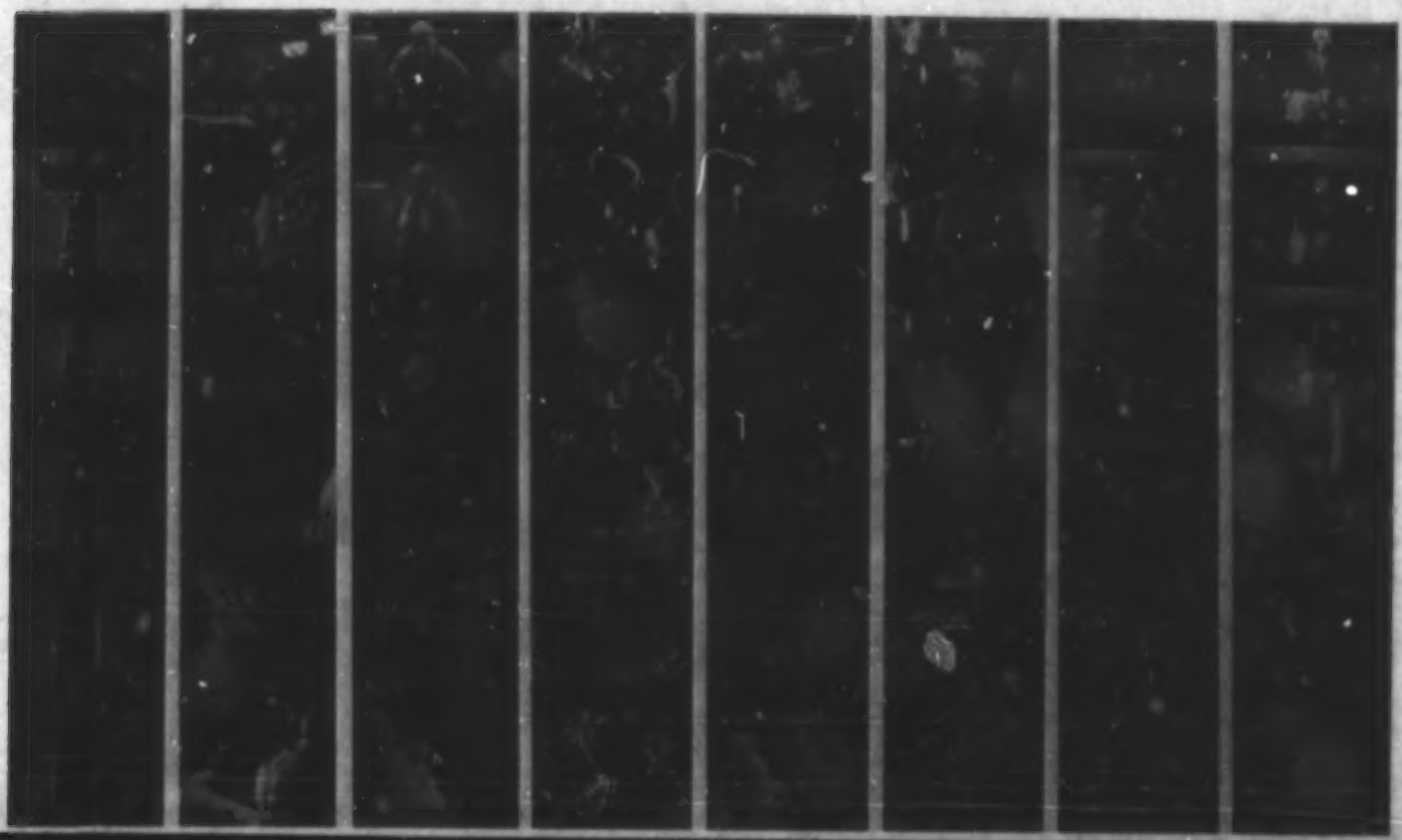
"RESURRECTION OF EVE"
PART 5 OF 15 PARTS
(22:27-23:09) SEXUAL INTERCOURSE. (23:12) EVE SCARRED. (23:16-23:58) FRANK RETURNS TO RADIO STATION. (24:00-24:57) FRANK QUARRELS WITH EX-GIRLFRIEND AT STORE COUNTER. (25:01) FIGHTER TRAINS. (25:08-26:38) FRANK WAITS AT APARTMENT FOR EVE. (26:42-27:31) EVE TELLS HIM SHE SAW BOXING MATCH WITH BLACK FIGHTER. (27:34-27:59) IN FANTASY FRANK BOXES BLACK FIGHTER.

"RESURRECTION OF EVE": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. M.P. 24595) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO ANATUNA, INC. (DATE OF ISSUANCE: NOV. 10, 1973).



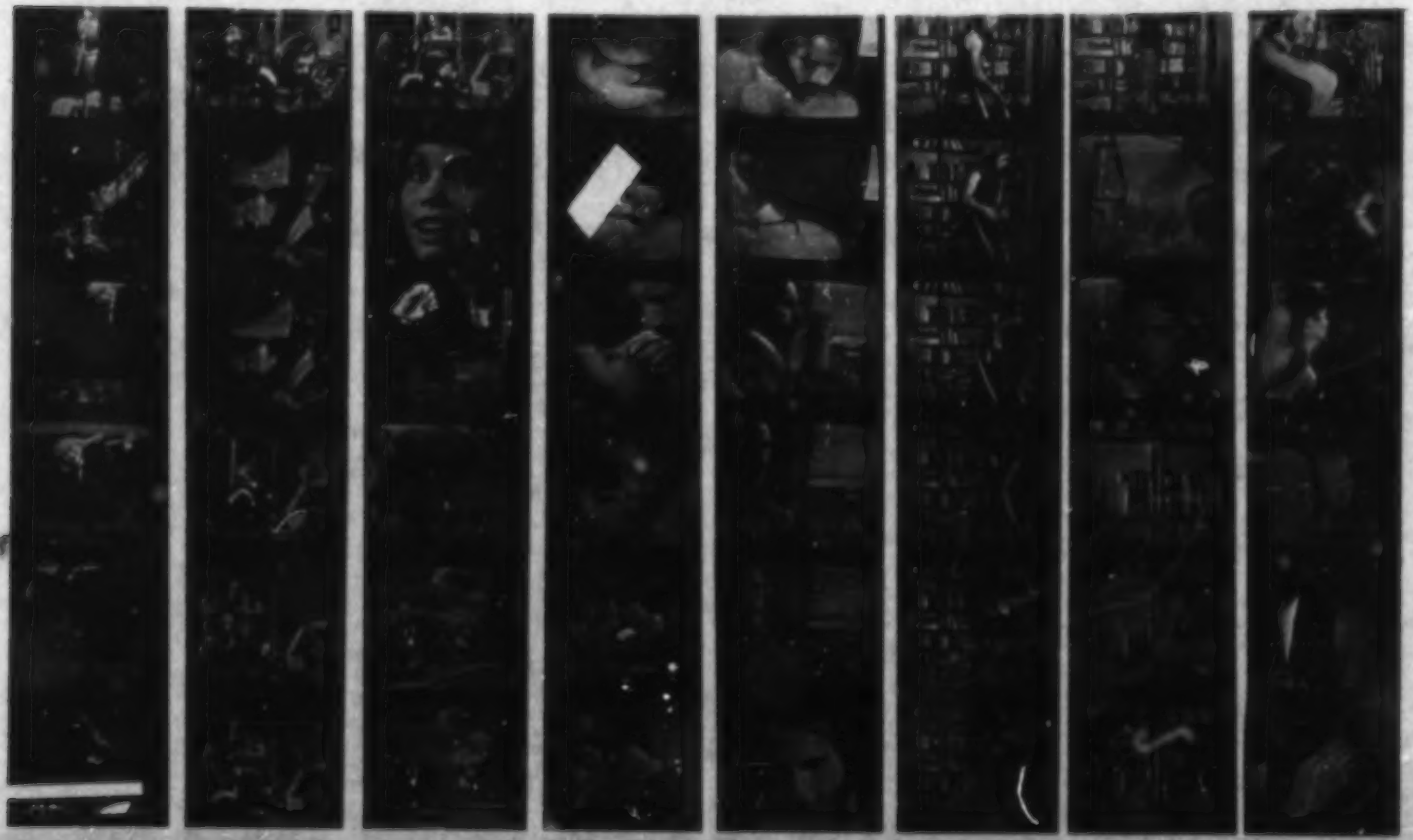
"RESURRECTION OF EVE"
PART 6 OF 15 PARTS
(28:02-28:06) SHADOW BOXING. (28:09-28:27) FRANK AND EVE TALK. (28:30-28:41) FRANK AND EVE HAVE SEXUAL INTERCOURSE. (28:44-29:57) EVE PERFORMS FELLATIO ON FRANK. (30:04-30:29) SEXUAL INTERCOURSE WITH BLACK FIGHTER (30:32-30:53) SEXUAL INTERCOURSE WITH FRANK. (30:57-31:46) EVE IS NOT SATISFIED. (31:49) EVE SCREAMS. (31:53-32:21) FLASHBACK TO EVE IN HOSPITAL. (32:23-33:13) FRANK VISITS EVE IN HOSPITAL RECOVERING FROM PLASTIC SURGERY. (33:13-33:34) CLOSEUP OF EVE RECOUPERATING.

"RESURRECTION OF EVE": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. M.P. 24595) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO ANATUNA, INC. (DATE OF ISSUANCE: NOV. 10, 1973).



"RESURRECTION OF EVE"
PART 7 OF 15 PARTS
(33:37-39:09) FRANK AND EVE GET MARRIED - MUSICAL GROUP AND DANCERS PERFORM AT CEREMONY. BLACK MUSICAL GROUP PERFORMS FOLLOWED BY MALE SINGER.

"RESURRECTION OF EVE": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. M.P. 24595) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO ANATUNA, INC. (DATE OF ISSUANCE: NOV. 10, 1973).



"RESURRECTION OF EVE"
PART 8 OF 15 PARTS
(39:13-39:37) WEDDING CELEBRATION CONTINUES. (39:40-40:43) FRANK PERFORMS AS DISC JOCKEY. (40:47-41:08) FRANK AT POOLSIDE. (41:11-42:35) FRANK AND EVE EMBRACE AND KISS IN BED. (42:39-42:53) EVE VACUUMS APARTMENT. (42:56-44:44) FRANK AND EVE EMBRACE. THEY STRIP AND KISS.

"RESURRECTION OF EVE": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. M.P. 24595) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO ANATUNA, INC. (DATE OF ISSUANCE: NOV. 10, 1973).

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"RESURRECTION OF EVE"
PART 11 OF 15 PARTS
(55:59-56:33) SEX ORGY CONTINUES. FELLATIO BY FEMALE ON MALE. MASTURBATION, CUNNILINGUS, SEXUAL INTERCOURSE. (57:01) EVE SEES FRANK HAVE INTERCOURSE WITH ANOTHER FEMALE. (57:36-59:31) EVE AND FRANK QUARREL. EVE APOLOGIZES. (59:35-61:30) EVEN AGAIN JOINS IN SEX ORGY.

"RESURRECTION OF EVE": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. M.P. 24595) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO ANATUNA, INC. (DATE OF ISSUANCE: NOV. 10, 1973).

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"RESURRECTION OF EVE"
PART 9 OF 15 PARTS
(44:48-46:22) FRANK AND EVE CONTINUE TO STRIP. (46:26-47:18) IN BED. EVE PERFORMS FELLATIO ON FRANK.
(47:25-50:20) FRANK MOUNTS EVE IN SEXUAL INTERCOURSE.

"RESURRECTION OF EVE"
PART 10 OF 15 PARTS
(50:23-50:33) INTERCOURSE CONTINUES. (50:37-51:15) EVE IS PERSUADED TO JOIN IN GROUP SEX. (51:18-55:55) MALES AND FEMALES GATHER FOR SEXUAL ACTIVITY - MEMBERS ARE PARTIALLY DRESSED - THEN DISROBE AND ENGAGE IN VARIOUS SEXUAL ACTS IN SEXUAL ORGY.

D-53

"RESURRECTION OF EVE"
PART 12 OF 15 PARTS
(61:34-61:35) SEX ORGY CONTINUES - FELLATIO SEXUAL INTERCOURSE, LESBIANISM, MASTURBATION, SEXUAL INTERCOURSE. (62:38-63:41) EVE IN CAR. FRANK TELLS EVE TO GET RID OF HER HANGUPS. (63:45-67:21) SCENES ALTERNATE BETWEEN PARTY SCENES AND EVE PERFORMING FELLATIO AND EVE AT HOME.

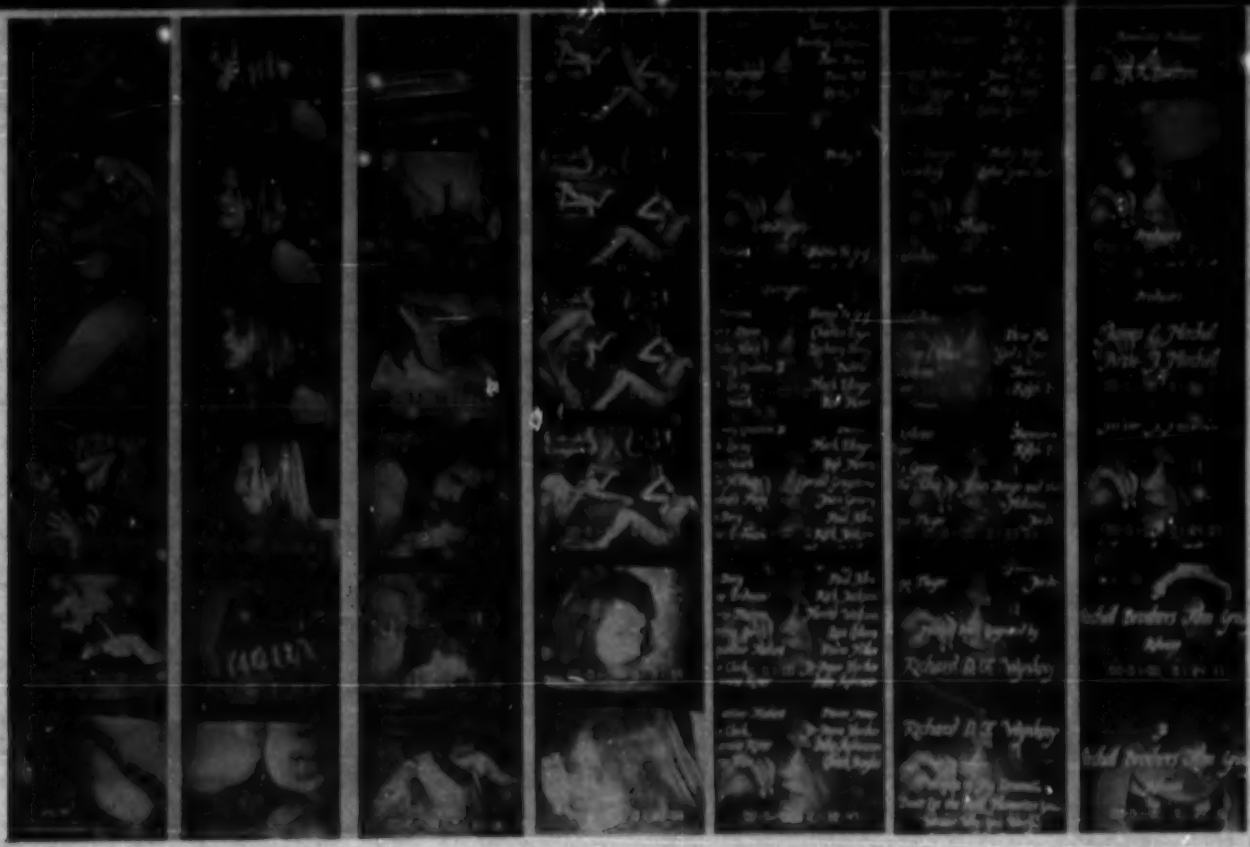
"RESURRECTION OF EVE": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. M.P. 24595) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO AMATUMA, INC. (DATE OF ISSUANCE: NOV. 10, 1973).

"RESURRECTION OF EVE"
PART 13 OF 15 PARTS
(67:25-68:05) EVE COLLAPSES ON BED. FRANK IS DISGUSTED. (68:09-70:16) FRANK GOES TO STATION TO WORK. EVE ACCEPTS PHONE INVITATION TO GROUP SEX PARTY. (70:21-73:14) SEX PARTY - FEMALE PERFORMING FELLATIO. CUNNILINGUS PERFORMED ON EVE. LESBIANISM. SEXUAL INTERCOURSE.

"RESURRECTION OF EVE": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. M.P. 24595) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO AMATUNA, INC. (DATE OF ISSUANCE: NOV. 10, 1973).

"RESURRECTION OF EVE"
PART 14 OF 15 PARTS
(73:17-73:28) GROUP SEX ORGY. (73:32-73:39) PENIS EJACULATES IN MOUTH OF FEMALE. (73:43-73:59) GROUP SEX CLOSEUP OF SEMEN EJACULATING FROM MALE PENIS. (74:02-75:00) PARTY SCENE. (75:04-76:25) SEX ORGY PARTY. FELLATIO. SEXUAL INTERCOURSE. (76:28-79:06) EVE IS DISROBED BY BLACK FIGHTER. HE FONDLES HER BREASTS. EVE MOUNTS FIGHTER IN SEXUAL INTERCOURSE WHILE HE IS SEATED.

"RESURRECTION OF EVE": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. M.P. 24595) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO ANATUNA, INC. (DATE OF ISSUANCE: NOV. 10, 1973).



"RESURRECTION OF EVE"
PART 15 OF 15 PARTS
(79:10-82:06) SEXUAL INTERCOURSE, FELLATIO, SEXUAL ORGY. (82:10-84:15) CREDITS.

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APPENDIX D

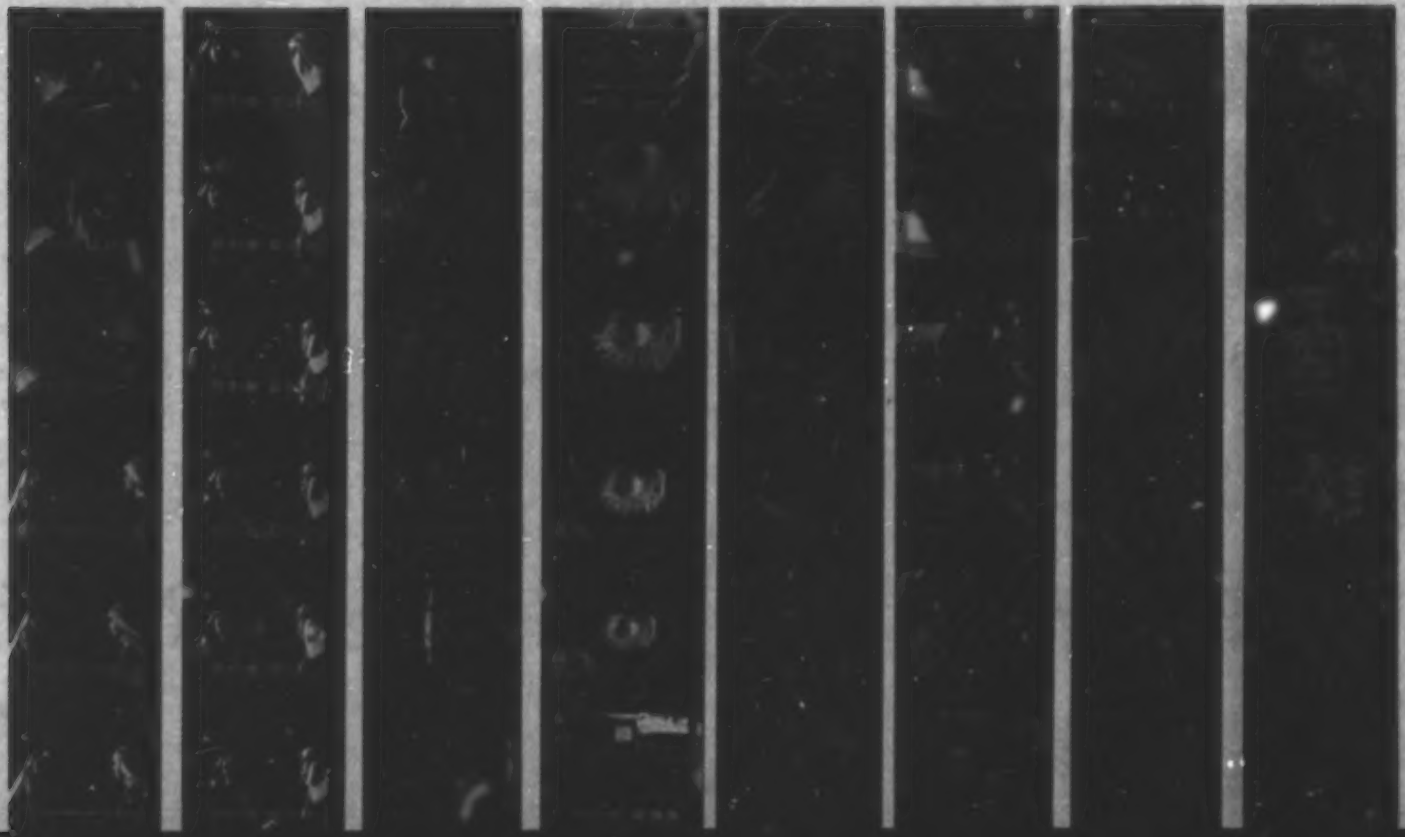
TIME-MOTION STUDY* OF THE FILM

"SODOM AND GOMORRAH"

The motion picture film "Sodom and Gomorrah" was issued a "Certificate of Registration of a Claim to Copyright" by the Copyright Office on Nov. 14, 1975.

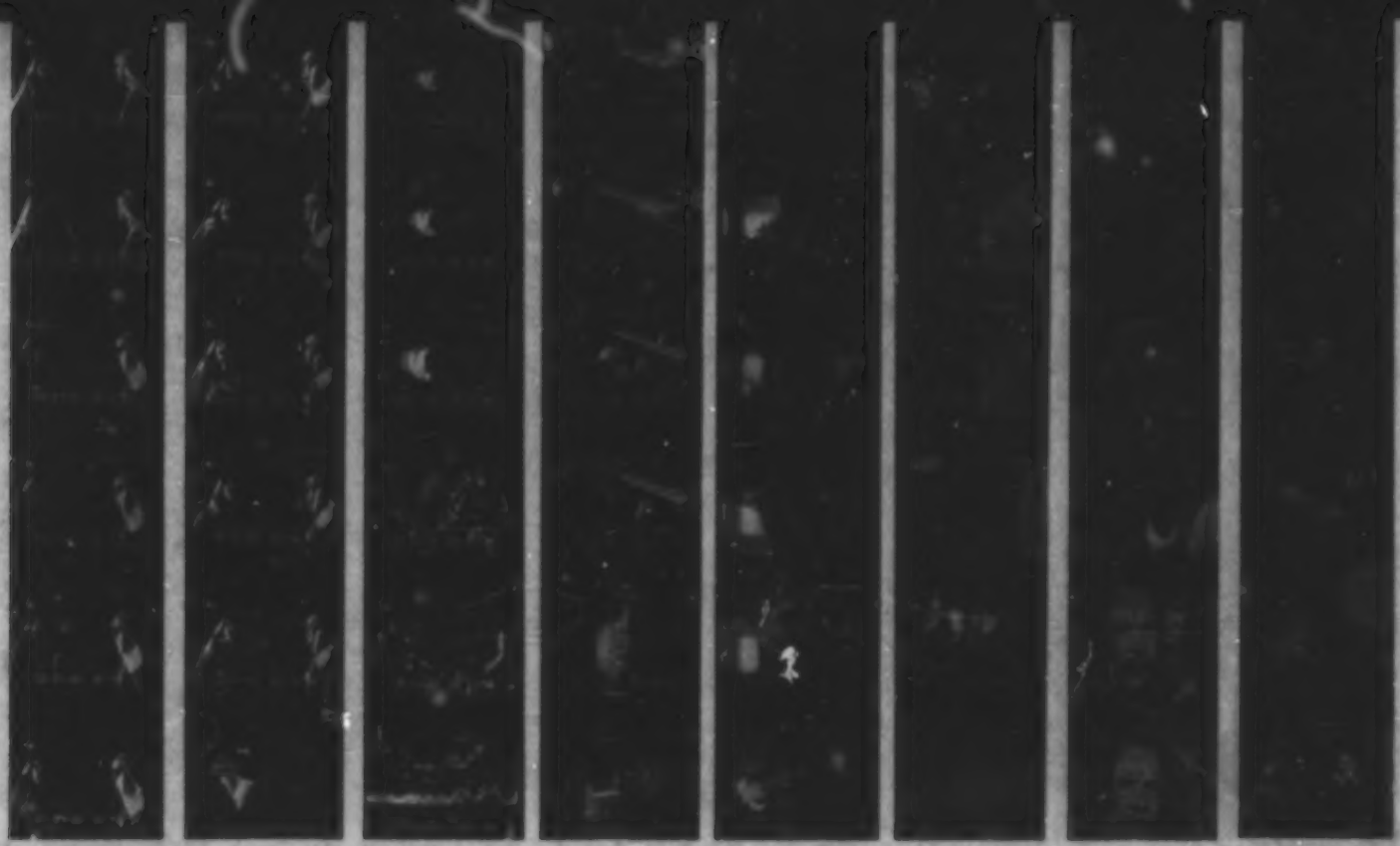
* A time-motion study is a chronological series of still photographs of a motion picture film, timed in their relative order of appearance, which, by "stopping" the movement appearing on the motion picture screen and recording the same, permits the type of conduct being portrayed thereon to be analyzed in a fair and accurate manner. Photographs have been taken every 3.6 seconds playing time.

"SODOM AND GOMORRAH - THE LAST SEVEN DAYS": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. L.P. 45011) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO CINEMA 7, INC. (DATE OF ISSUANCE: NOV. 14, 1975).



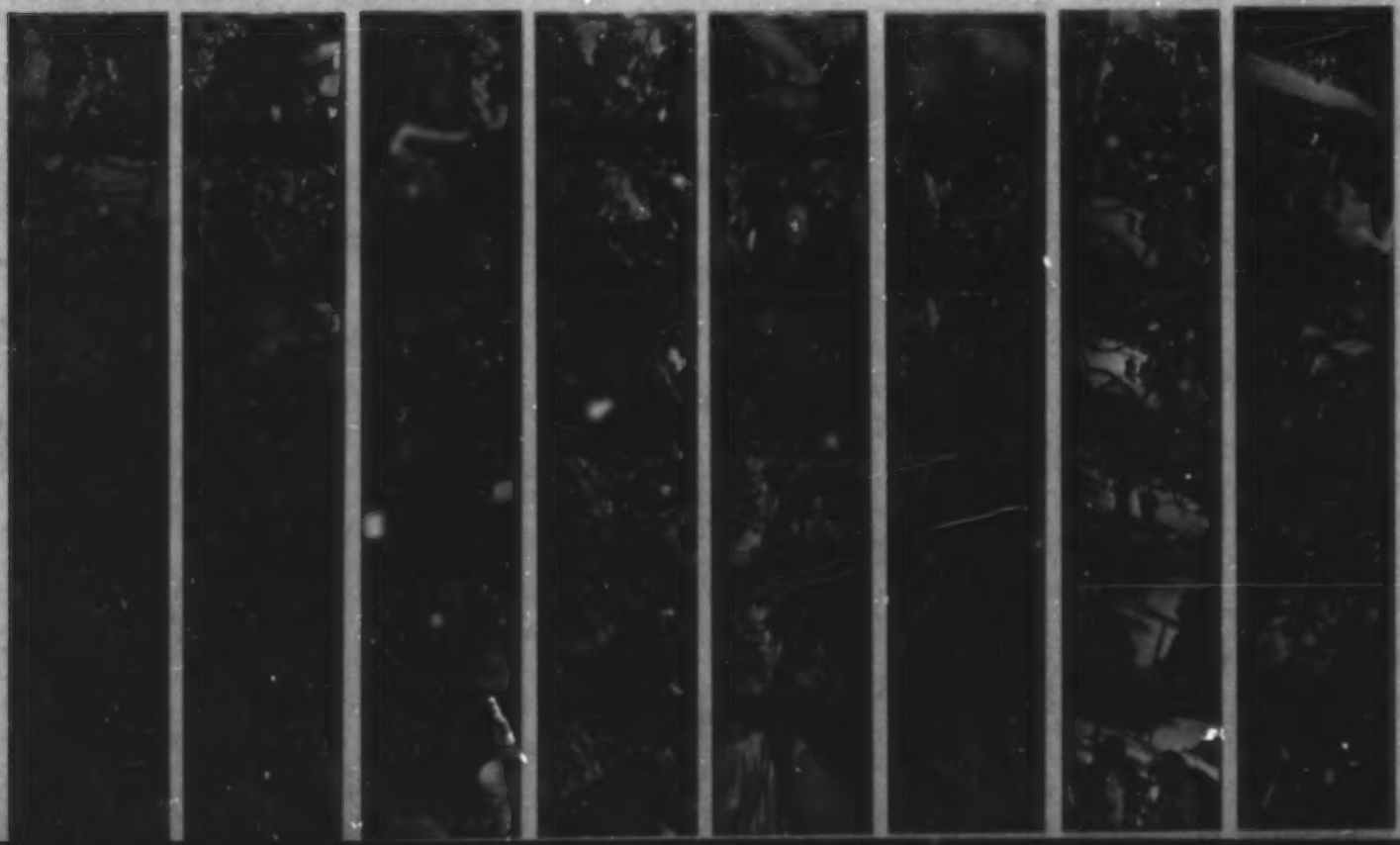
"SODOM AND GOMORRAH"
PART 1 OF 18 PARTS
(00:01-01:33) TITLE, "SODOM AND GOMORRAH" AND FACE OF NARRATOR. (01:36-03:12) MALE CHASING FEMALE, CATCHES HER, AND FORCES HER TO PERFORM FELLATIO. (03:15-03:40) FELLATIO. (03:47-04:19) FRIENDS OF FEMALE KILL MALE. (04:22-05:36) LOT AND PART OF FAMILY TO TALK TO STRANGERS.

"SODOM AND GOMORRAH - THE LAST SEVEN DAYS": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. L.P. 45011) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO CINEMA 7, INC. (DATE OF ISSUANCE: NOV. 14, 1975).

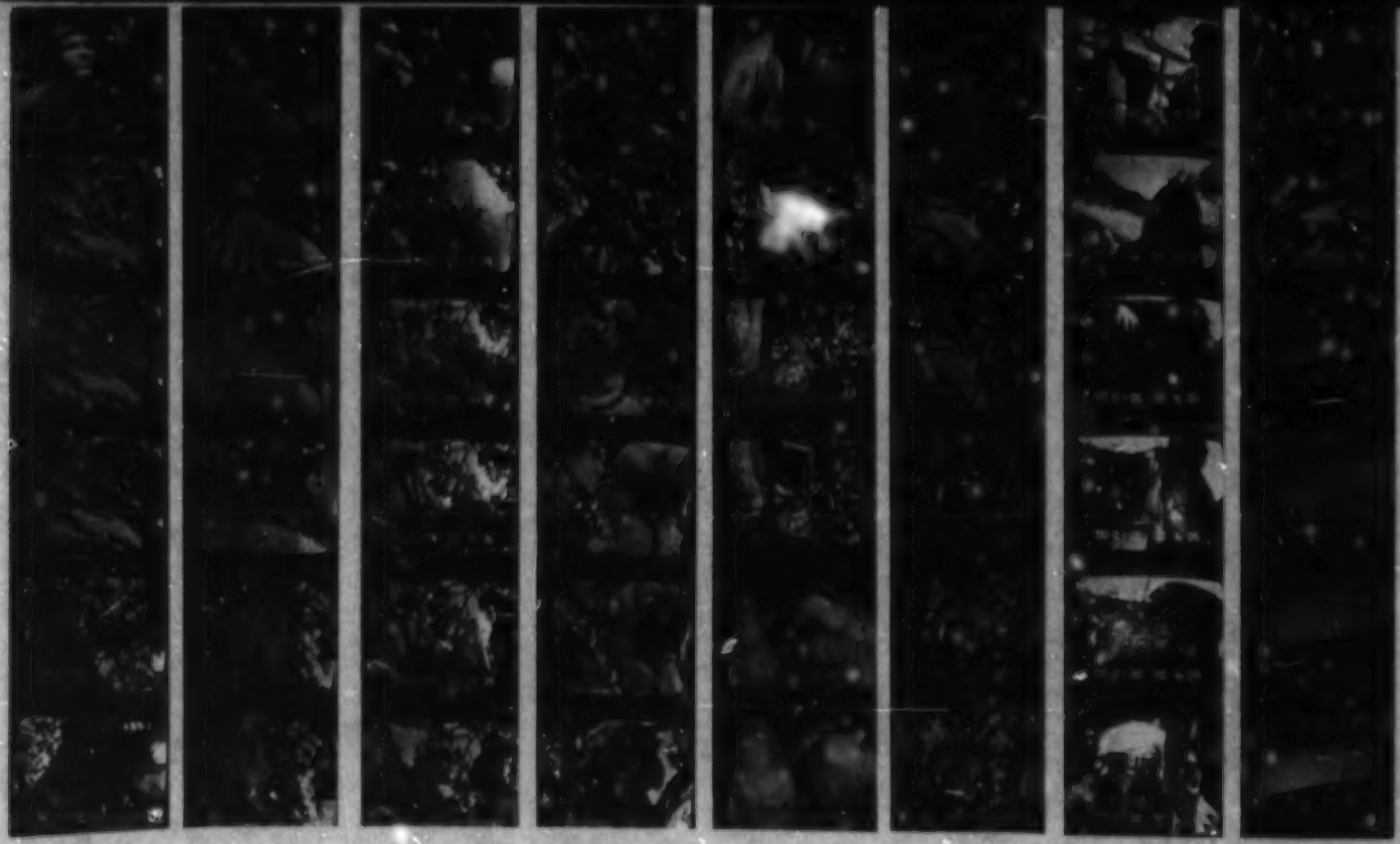


"SODOM AND GOMORRAH"
PART 2 OF 18 PARTS
(05:40-07:05) LOT AND FAMILY DISCUSS MOVING. (07:08-08:47) SPACE SHOTS. INSIDE A SPACE SHIP A MONKEY DRESSED IN A CAPE AND HAT IS APPARENTLY TUNING IN ON LOT'S CONVERSATION. THE MONKEY'S VOICE HAS A "JOHN WAYNE" ACCENT (08:51-11:16) LOT AND FAMILY. MALE MEETS ONE OF LOT'S DAUGHTERS. THEY GO OFF INTO THE HILLS AND CLIMB A TREE

"SODOM AND GOMORRAH - THE LAST SEVEN DAYS": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. L.P. 45011) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO CINEMA 7, INC. (DATE OF ISSUANCE: NOV. 14, 1975).



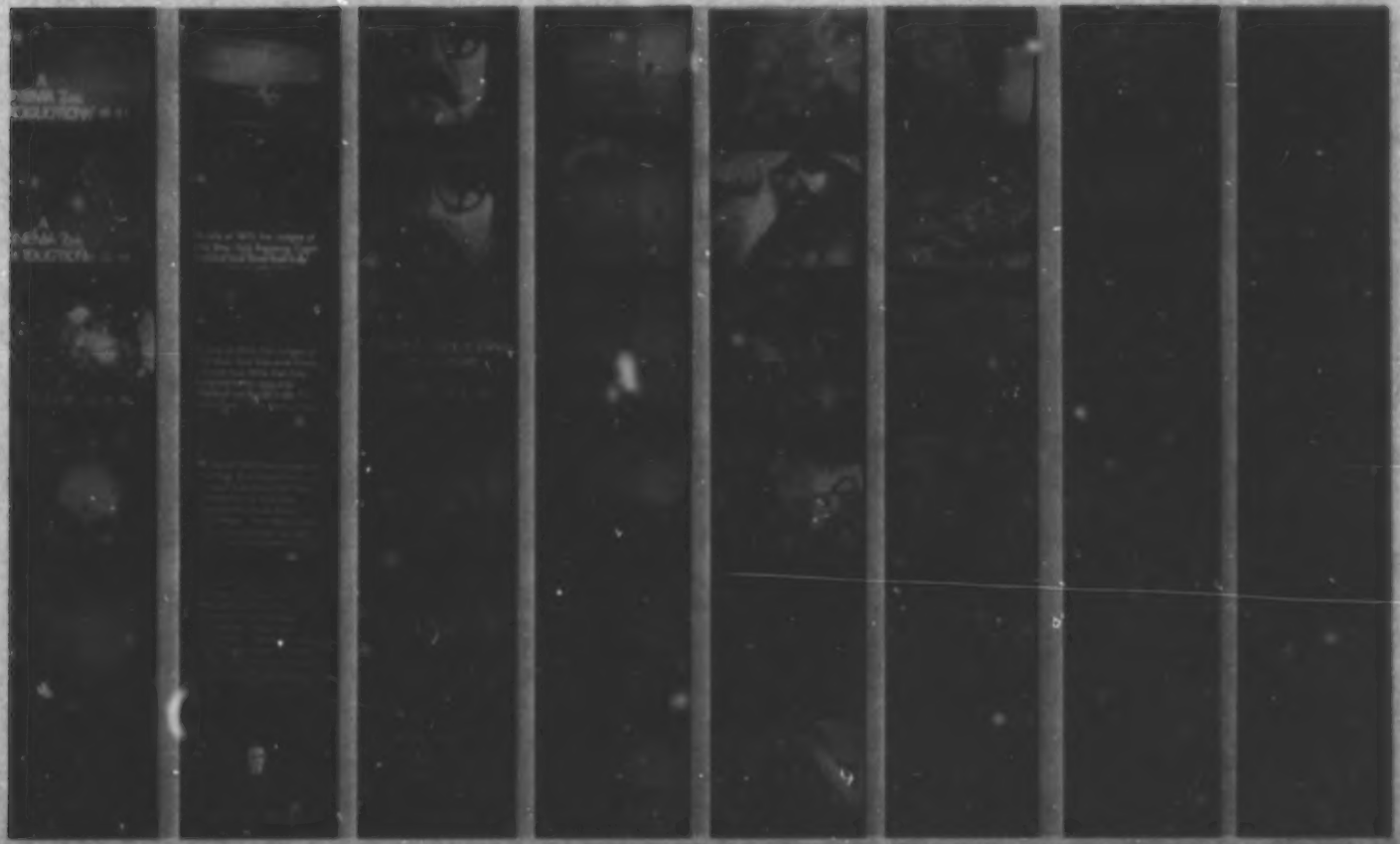
D-66



D-67

"SODOM AND GOMORRAH"
PART 3 OF 10 PARTS
(11:19-12:19) MALE AND FEMALE IN TREE. (12:23-13:16) MALE ENGAGES IN CUNNILINGUS WITH FEMALE. (13:19-14:02) MALE AND FEMALE DISCUSS THAT NORMAL INTERCOURSE IS AGAINST THE LAW. (14:05-15:33) COUPLE ENGAGES IN SODOMY IN A TREE. (15:37-16:12) MALE REMOVES PENIS FROM FEMALE'S ANUS AND EJACULATES. EJACULATION FALLS ON THE FACE OF LOT WHO IS UNDER THE TREE. (16:15-16:41) SCENE SHIFT TO SPACE SHIP AND MONKEY. (16:44-16:55) LOT GOES OFF ALONE TO PRAY.

"SODOM AND GOMORRAH - THE LAST SEVEN DAYS": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. L.P. 45011) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO CINEMA 7, INC. (DATE OF ISSUANCE: NOV. 14, 1975).

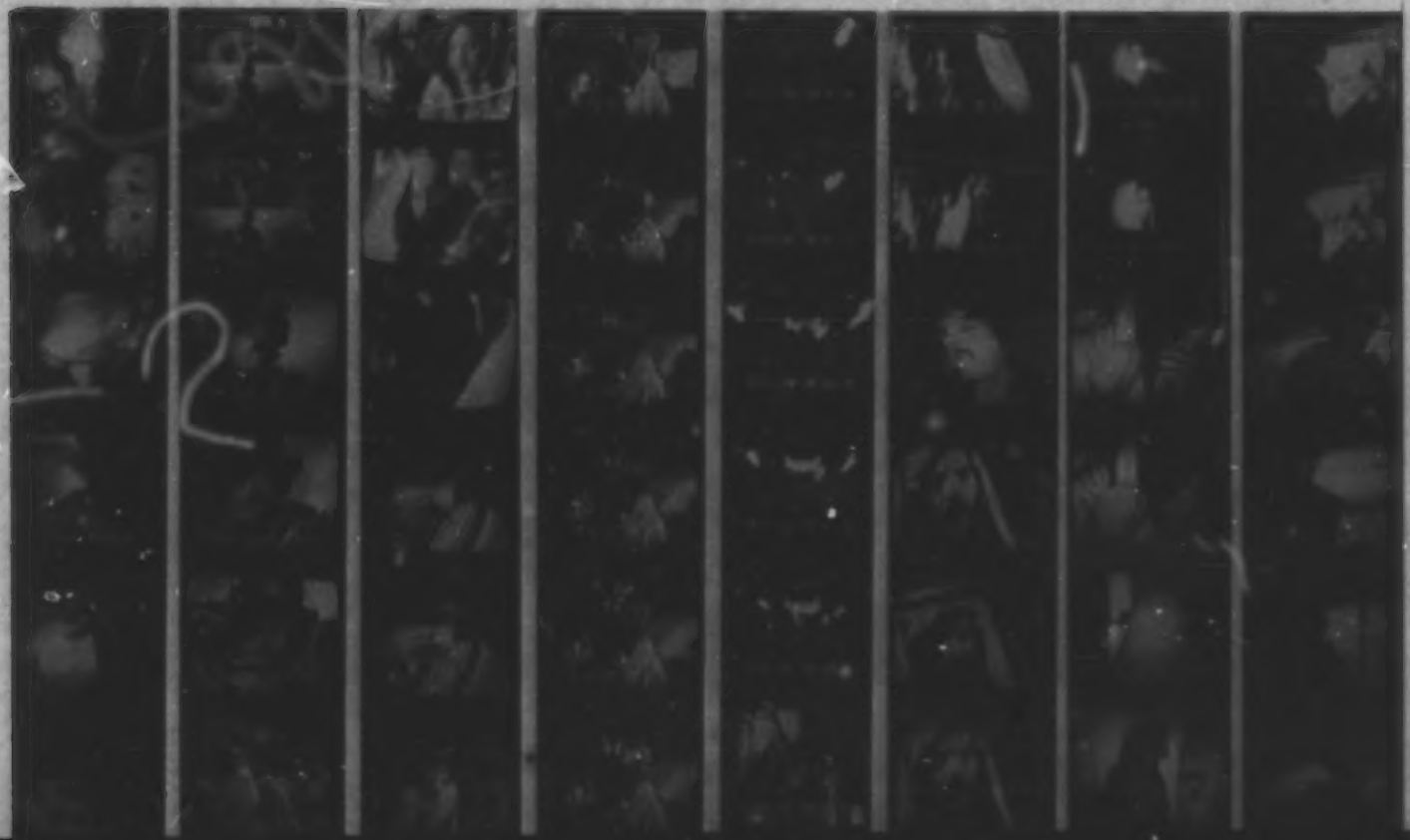


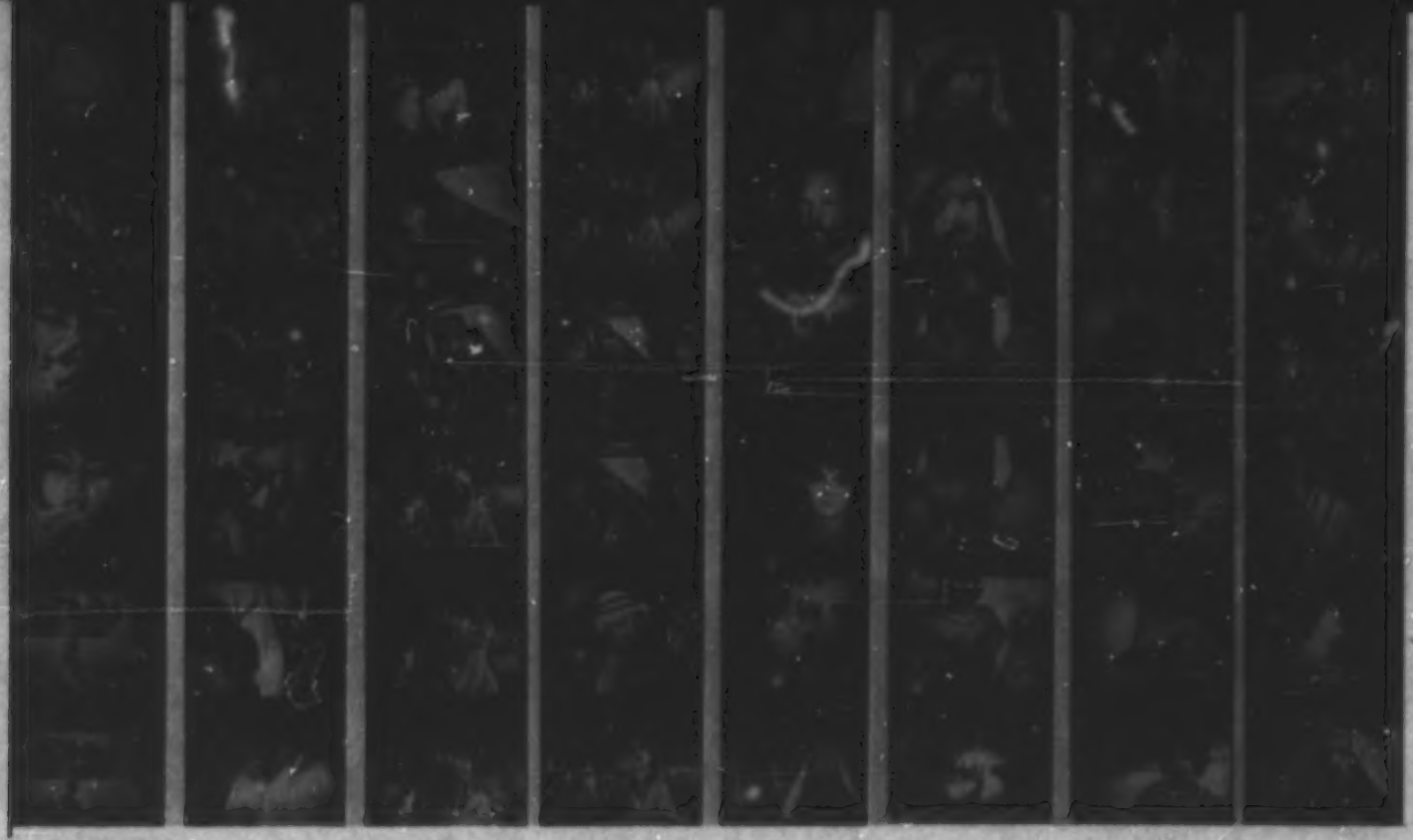
"SODOM AND GOMORRAH"
PART 4 OF 18 PARTS
(16:58-17:37) LOT PRAYS. (17:41-22:08) A MALE AND FEMALE MEET, TALK, AND THEN ENGAGE IN SEXUAL INTERCOURSE UNDER TREE. MALE WITH LONG BEARD AND STAFF APPROACHES MALE AND FEMALE UNDER TREE. (22:12-22:39) MALE WITH BEARD MASTURBATES AND FELLATES HIMSELF.

"SODOM AND GOMORRAH - THE LAST SEVEN DAYS": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. L.P. 45011) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO CINEMA 7, INC. (DATE OF ISSUANCE: NOV. 14, 1975).

"SODOM AND GONORRAH"
PART 5 OF 18 PARTS
(22:40-23:49) MALE WITH BEARD CONTINUES TO MASTURBATE WHILE WATCHING COUPLE ENGAGED IN INTERCOURSE. (23:54-24:38) SCENE SHIFTS. LOT AND HIS FAMILY ARRIVE IN SODOM. THEY WATCH SLAVE BUYING SCENE WHERE FEMALES ARE PUT ON AUCTION AND SOLD. (24:42-24:45) CUSTOMER INSPECTS FEMALE VAGINAL AREA. (24:49-26:28) SCENES OF SLAVE MARKET. (26:31-27:07) KING OF SODOM. (27:10-28:11) LOT AND FAMILY TALKING IN FRONT OF THE KING OF SODOM, AS SLAVE AUCTION CONTINUES.

"SODOM AND GOMORRAH - THE LAST SEVEN DAYS": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. L.P. 45011) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO CINEMA 7, INC. (DATE OF ISSUANCE: NOV. 14, 1975).

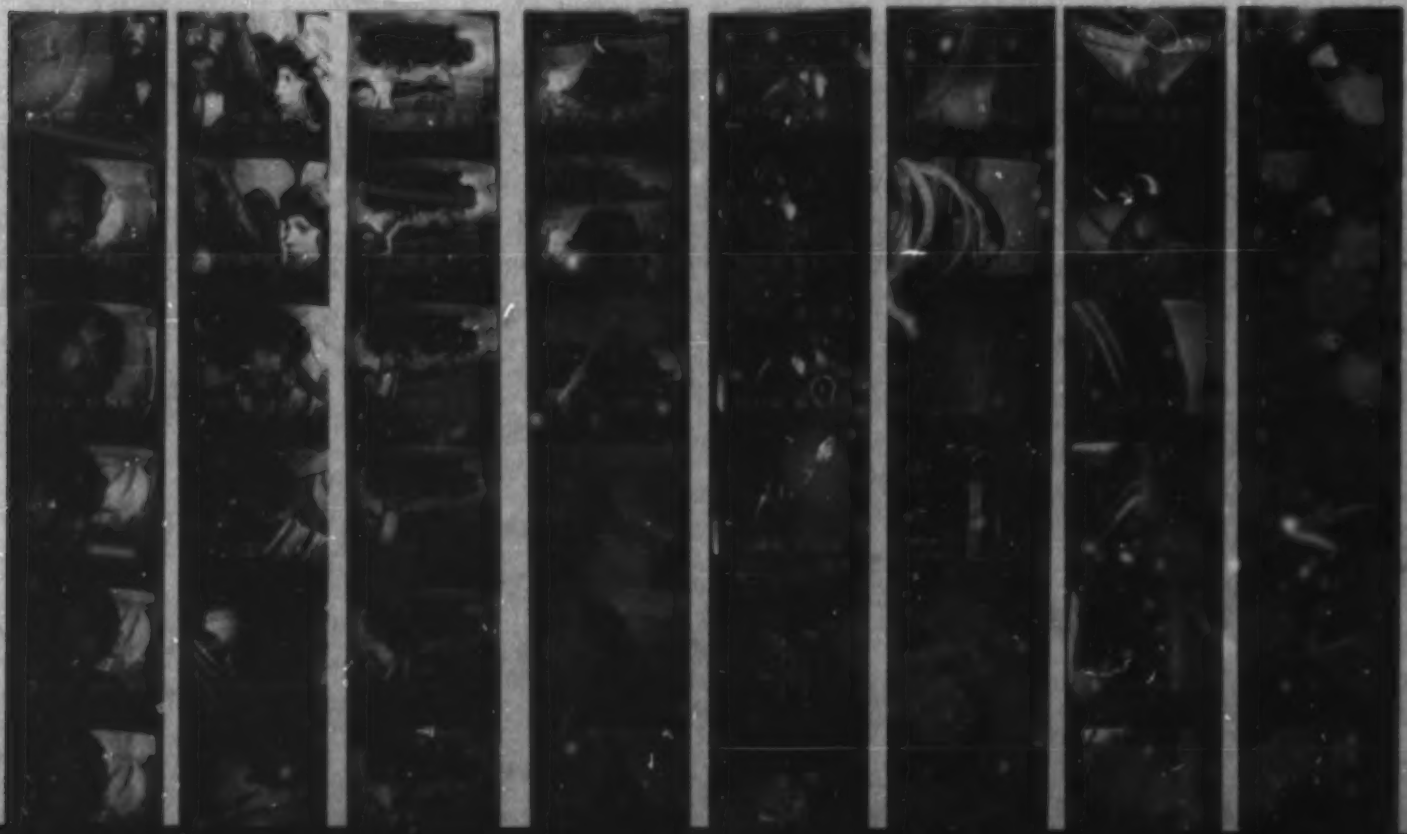


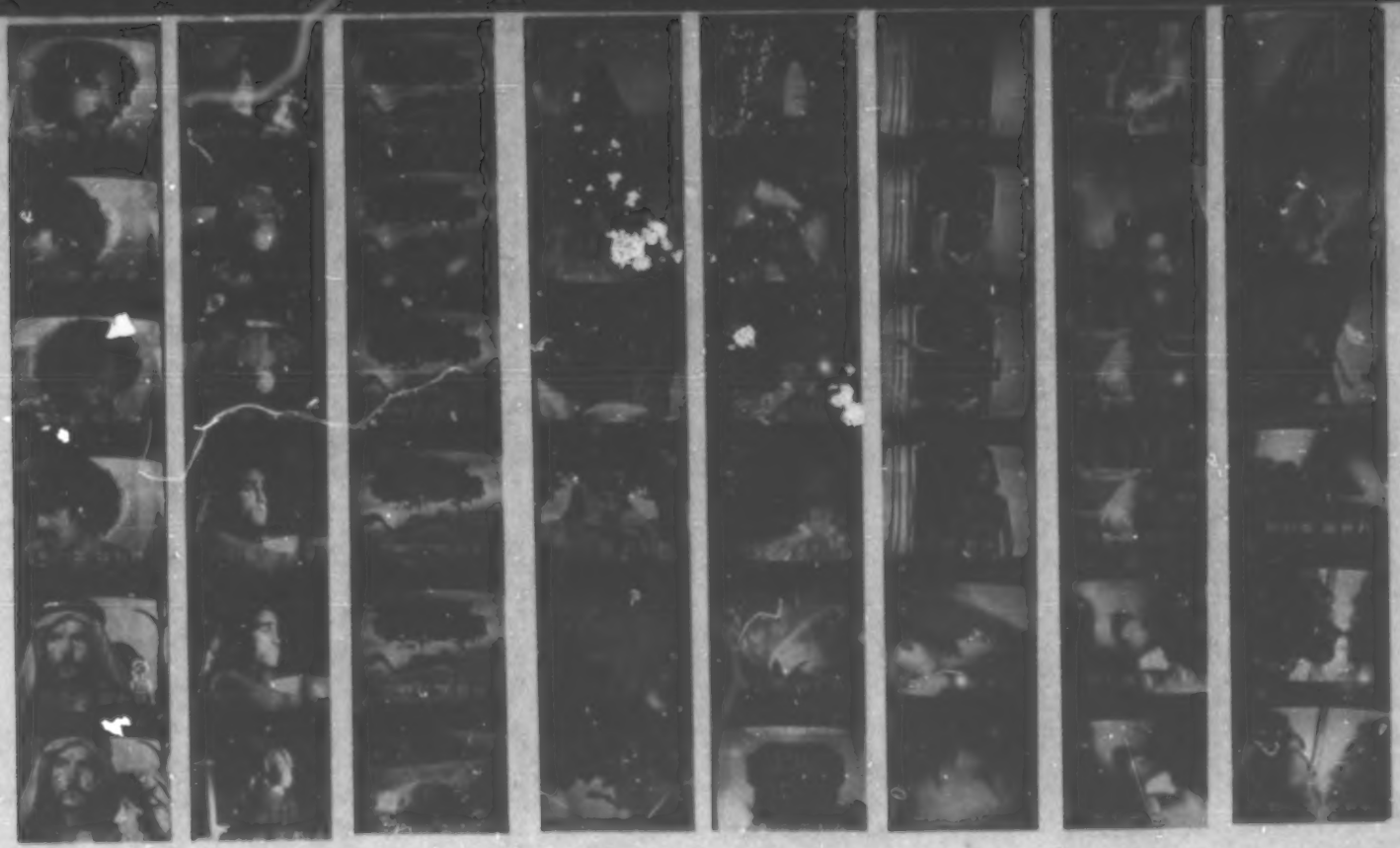


D-73

"SODOM AND GOMORRAH"
PART 6 OF 18 PARTS
(28:17-28:49) GENITALS ARE SHOWN. FEMALE LICKS FINGERS. (28:53-33:54) KING OF SODOM TALKS WITH LOT AND HIS WIFE.

"SODOM AND GOMORRAH - THE LAST SEVEN DAYS": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. L.P. 45011) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO CINEMA 7, INC. (DATE OF ISSUANCE: NOV 14, 1975).





"SODOM AND GOMORRAH"
PART 7 OF 18 PARTS
(33:58-34:54) KING OF SODOM CONTINUES TALKING WITH LOT. (34:58-39:34) SPACE SHIP INTERIOR SHOW MONKEY AND MALE ASSISTANT DRESSED IN BATHING SUIT AND CAPE. LOT GOES OFF TO PRAY AGAIN. SCENE SWITCHES TO MALE IN SPACE SHIP. HE ENTERS ROOM WHERE NUDE FEMALE RESTS IN GLASS CASE. MALE PRESSES AGAINST AGAINST CASE AND BEGINS TO MASTURBATE.

"SODOM AND GOMORRAH - THE LAST SEVEN DAYS": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. L.P. 45011) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO CINEMA 7, INC. (DATE OF ISSUANCE: NOV. 14, 1975).

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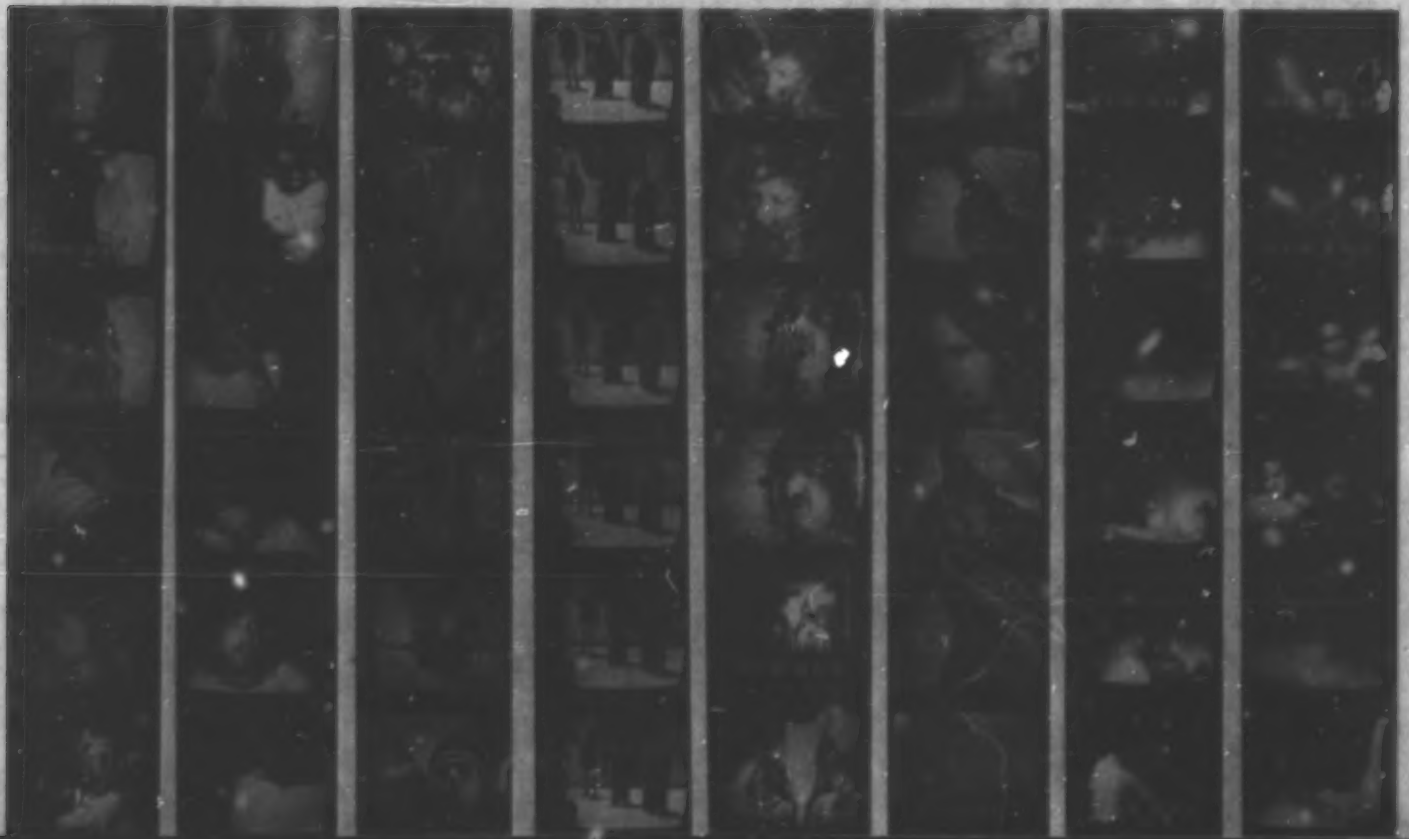
"SODOM AND GOMORRAH"
PART 8 OF 16 PARTS
(39:37-41:52) MALE MASTURBATES AGAINST CASE, EJACULATES INTO TUBE. (41:55-42:20) MALE THEN TALKS WITH MOOSE HANGING ON WALL. (42:23-45:13) MALE FROM SPACE SHIP SHOWN ON EARTH DRESSED IN BIBLICAL CLOTHES TALKING WITH ONE OF LOT'S DAUGHTERS.

"SODOM AND GOMORRAH - THE LAST SEVEN DAYS": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. L.P. 45011) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO CINEMA 7, INC. (DATE OF ISSUANCE: NOV. 14, 1975).

"SODOM AND GOMORRAH"
PART 9 OF 10 PARTS
(45:17-45:34) SPACE SHIP MALE NOW DRESSED IN EARTH CLOTHES TALKS WITH DAUGHTERS. (45:39-45:49) LOT AND HIS WIFE SELLING THINGS AT A STORE THEY HAVE SET UP IN SODOM. (45:52-46:13) A MALE GOES IN BACK SECTION OF TENT WITH LOT'S WIFE. MALE PLACES CUCUMBER IN THE VAGINA OF LOT'S WIFE, THEN PLACES CUCUMBER IN HIS MOUTH. (46:17-48:03) MALE AND LOT'S WIFE CONTINUE WITH CUCUMBER. (48:07-48:45) LOT AND WIFE AND OTHER PEOPLE TALKING. (48:49-50:53) KING OF SODOM TALKS TO THE PEOPLE.

"SODOM AND GOMORRAH - THE LAST SEVEN DAYS": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. L.P. 45011) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO CINEMA 7, INC. (DATE OF ISSUANCE: NOV. 14, 1975).



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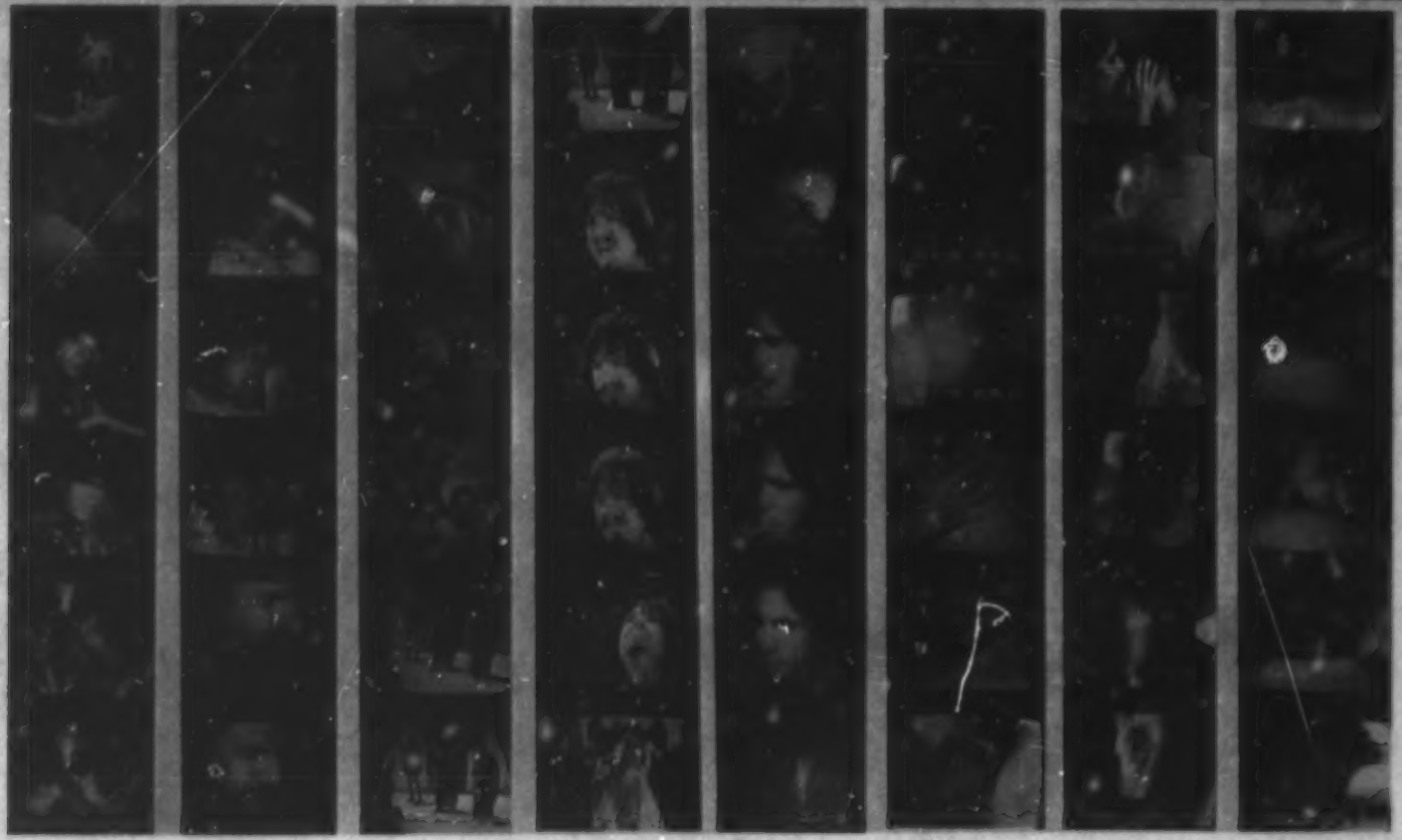
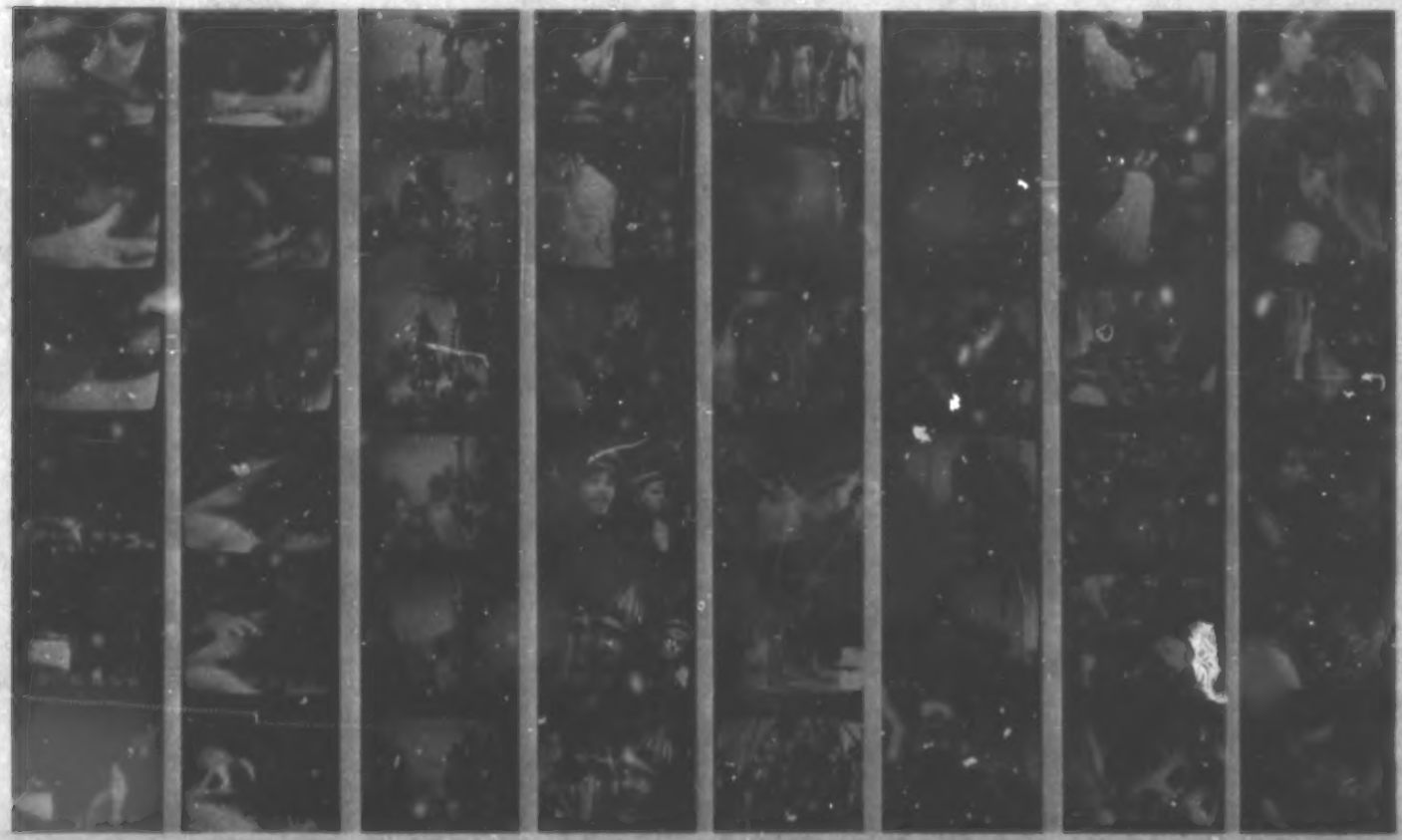


D-01

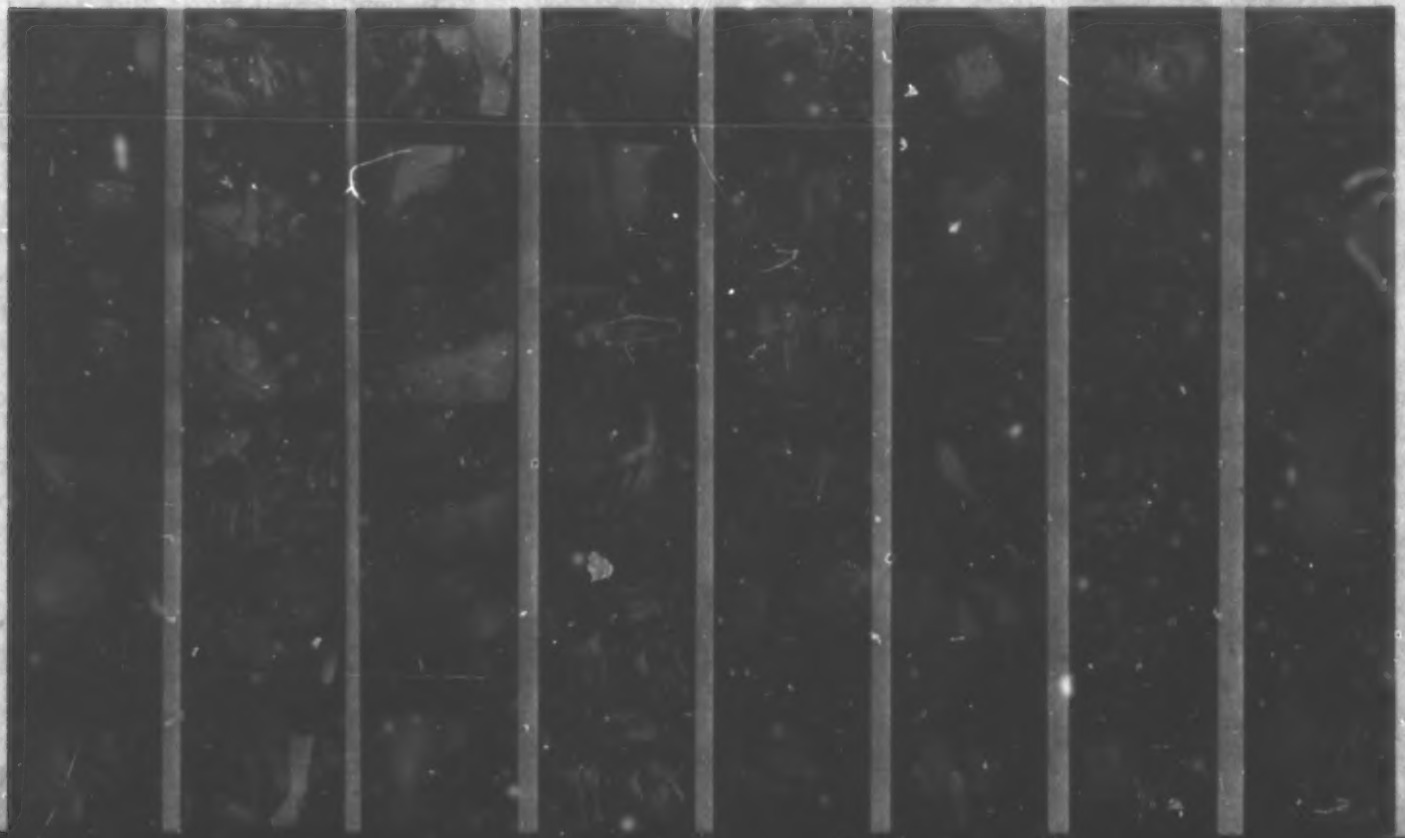
"SODOM AND GOMORRAH"
PART 10 OF 18 PARTS
(50:56-51:35) PEOPLE SPEAK WITH KING OF SODOM. (51:39-52:25) A MALE PLACES PIECE OF CHICKEN AGAINST VAGINA OF FEMALE AND THEN EATS CHICKEN. (52:28-54:43) PEOPLE CONTINUE TALKING. (54:46-56:32) FEMALES ENGAGE IN LESBIAN-TYPE KISSING OF BREASTS.

"SODOM AND GOMORRAH - THE LAST SEVEN DAYS": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. L.P. 45011) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO CINEMA 7, INC. (DATE OF ISSUANCE: NOV. 14, 1975).



"SODOM AND GOMORRAH"
PART 11 OF 18 PARTS
(56:35-57:43) LESBIANISM CONTINUES AND KING OF SODOM KISSES A FEMALE NEAR THE VAGINA AREA. (57:47-57:50) KING OF SODOM. (57:54-1:01:30) OUTDOOR SCENES - MARKET PLACE. PEOPLE EATING AND DRINKING. (1:01:33-1:02:01) FELLATIO. (1:02:05-1:02:13) FEMALES LAUGHING.

"SODOM AND GOMORRAH - THE LAST SEVEN DAYS": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. L.P. 45011) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO CINEMA 7, INC. (DATE OF ISSUANCE: NOV. 14, 1975).



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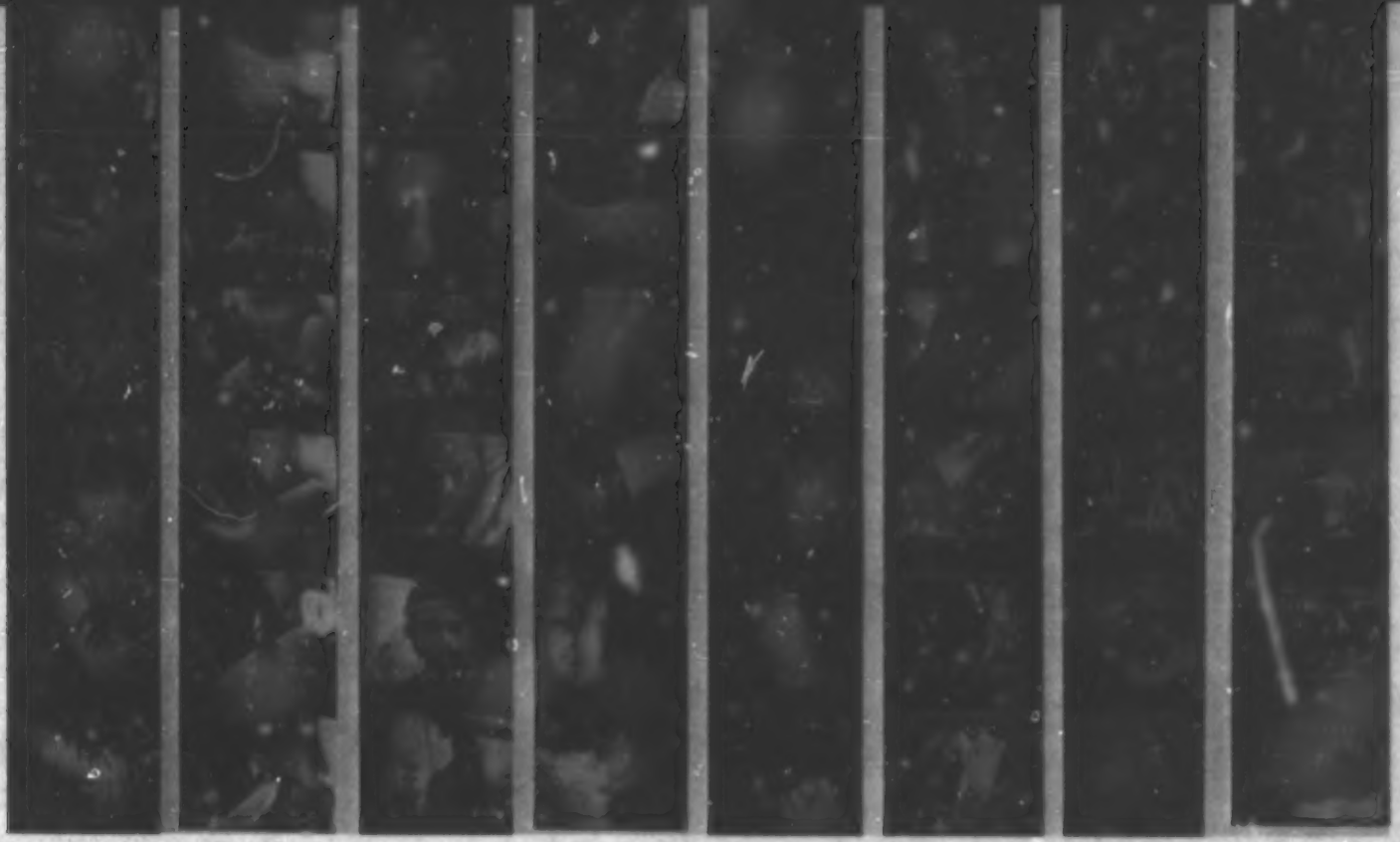
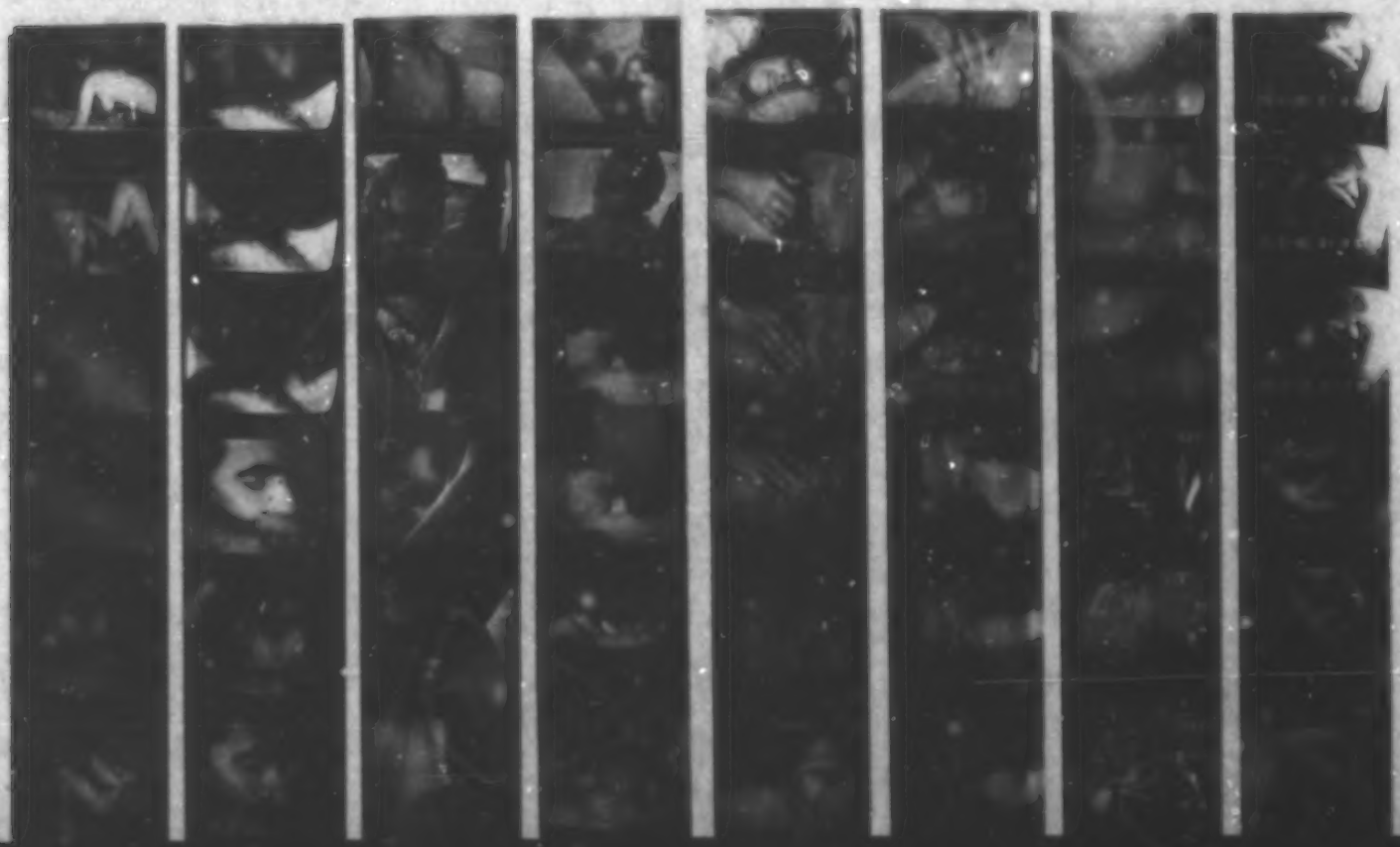


"SODOM AND GOMORRAH"
PART 12 OF 18 PARTS
(L02:16-L02:33) FELLATIO. (L02:44-L03:05) MALE PLACES BANANA IN FEMALE'S VAGINA, THEN PLACES BANANA IN HER MOUTH. (L03:09-L03:51) FELLATIO. (L03:55-L04:09) ANALINGUS. (L04:12) FELLATIO. (L04:16-L07:52) CUNNILINGUS, FELLATIO, SEXUAL ORGY.

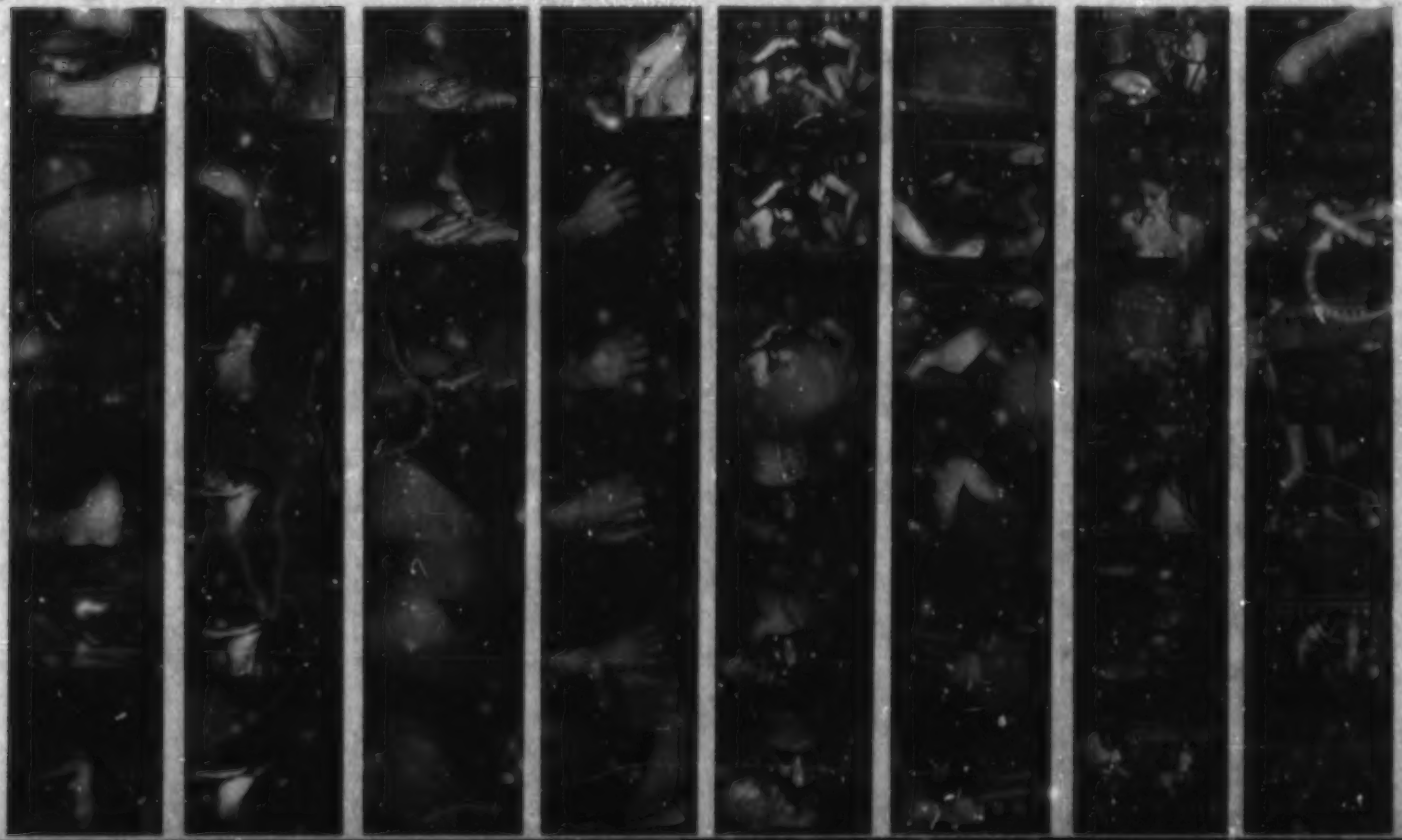
"SODOM AND GOMORRAH - THE LAST SEVEN DAYS": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. L.P. 45011) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO CINEMA 7, INC. (DATE OF ISSUANCE: NOV. 14, 1975).



D-89

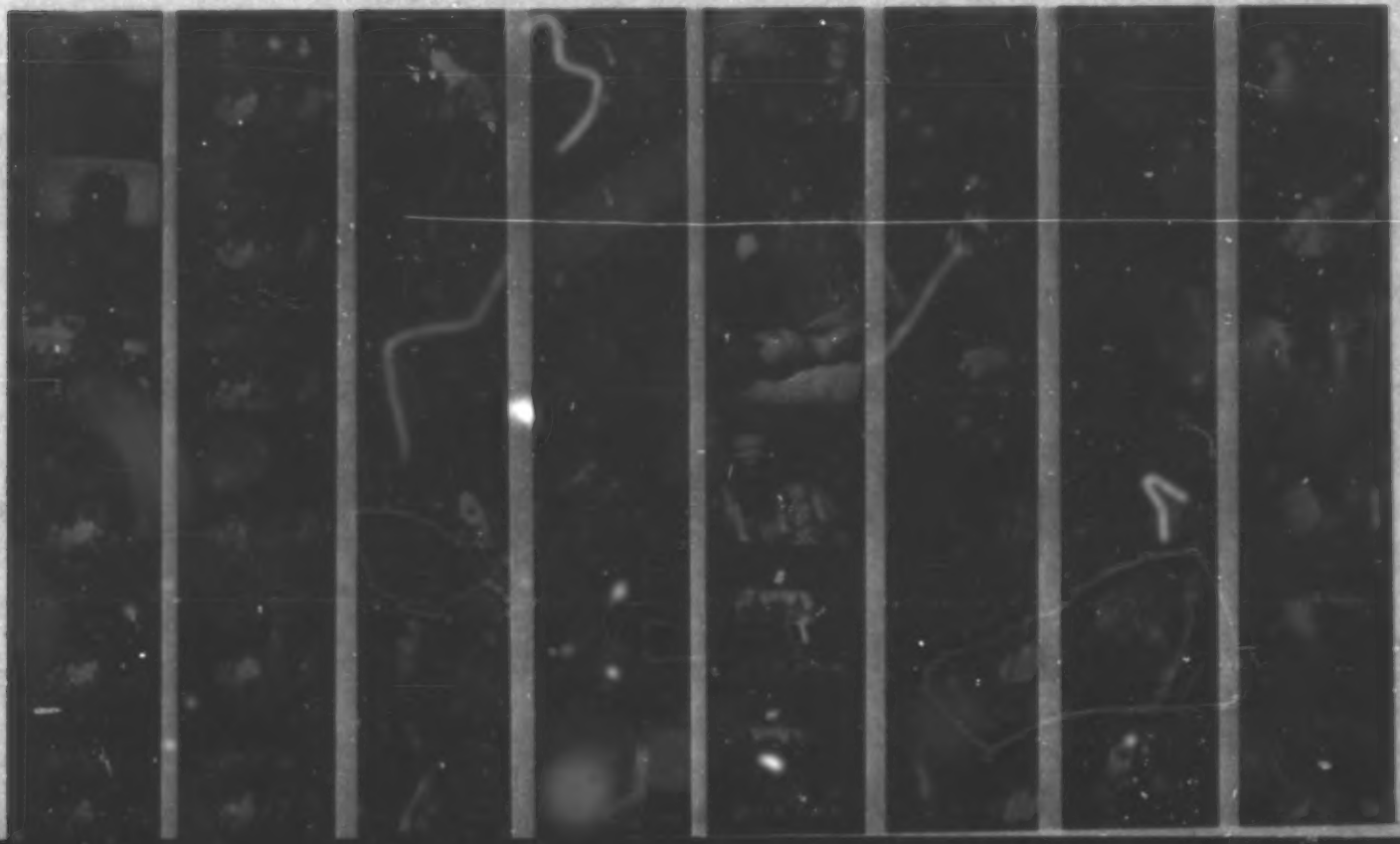
"SODOM AND GOMORRAH"
PART 13 OF 18 PARTS
(1D7:55-123:32) SEXUAL ORGY CONTINUES. CUNNILINGUS, SEXUAL INTERCOURSE, MASTURBATION, EJACULATION INTO A GOLD CUP, LESBIANISM.

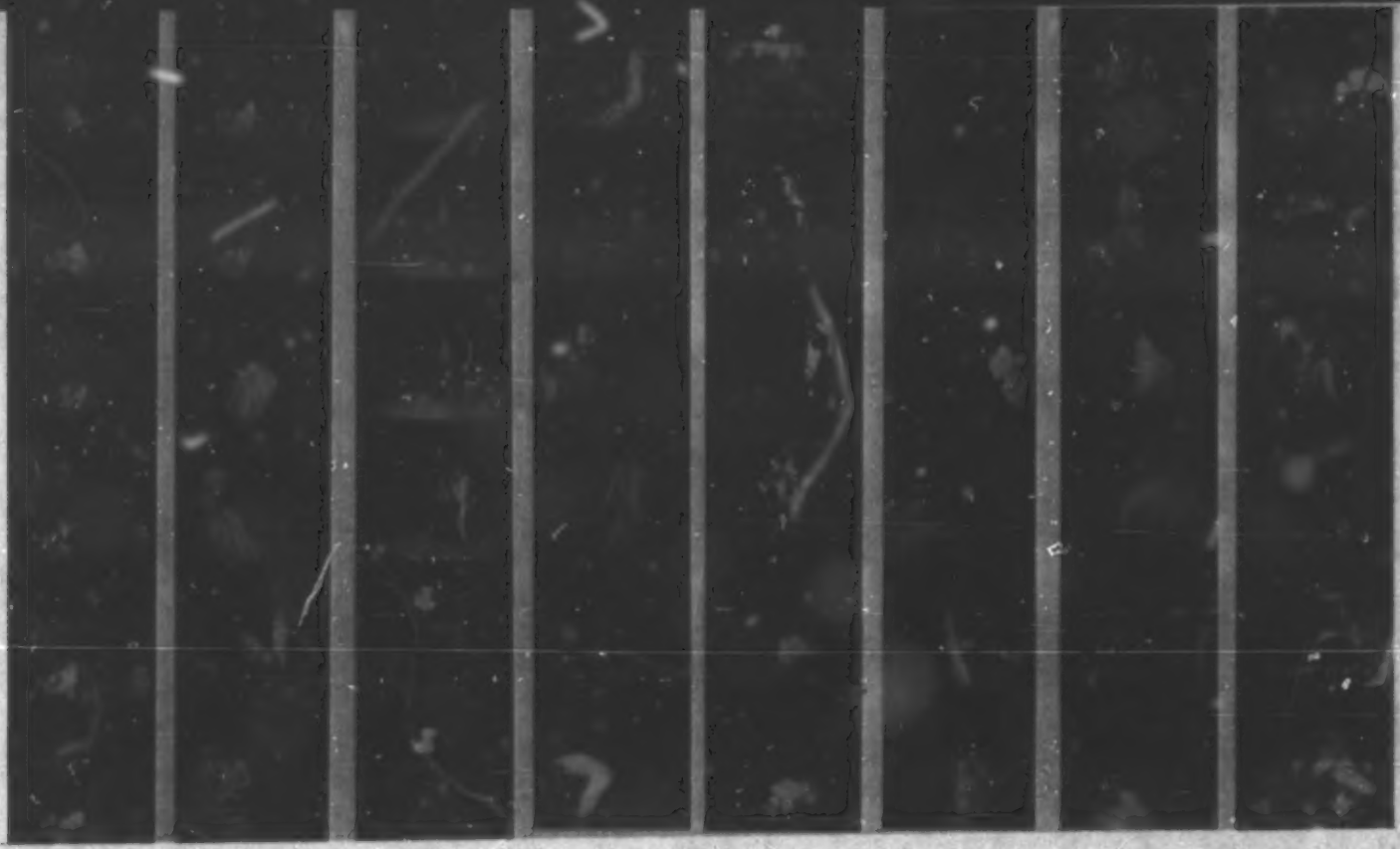
"SODOM AND GOMORRAH - THE LAST SEVEN DAYS": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. L.P. 45011) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO CINEMA 7, INC. (DATE OF ISSUANCE: NOV. 14, 1975).



"SODOM AND GOMORRAH"
PART 14 OF 18 PARTS
(1:13:36-1:19:12) SEXUAL ORGY CONTINUES. CUNNILINGUS, MASTURBATION, TWO FEMALES FELLATE PENIS, BLACK MALE SODOMIZES WHITE MALE WITH CUCUMBER. SCENE SHIFT TO OUTDOORS. MALE MASTURBATES NEAR DONKEY WHICH RUNS AWAY.

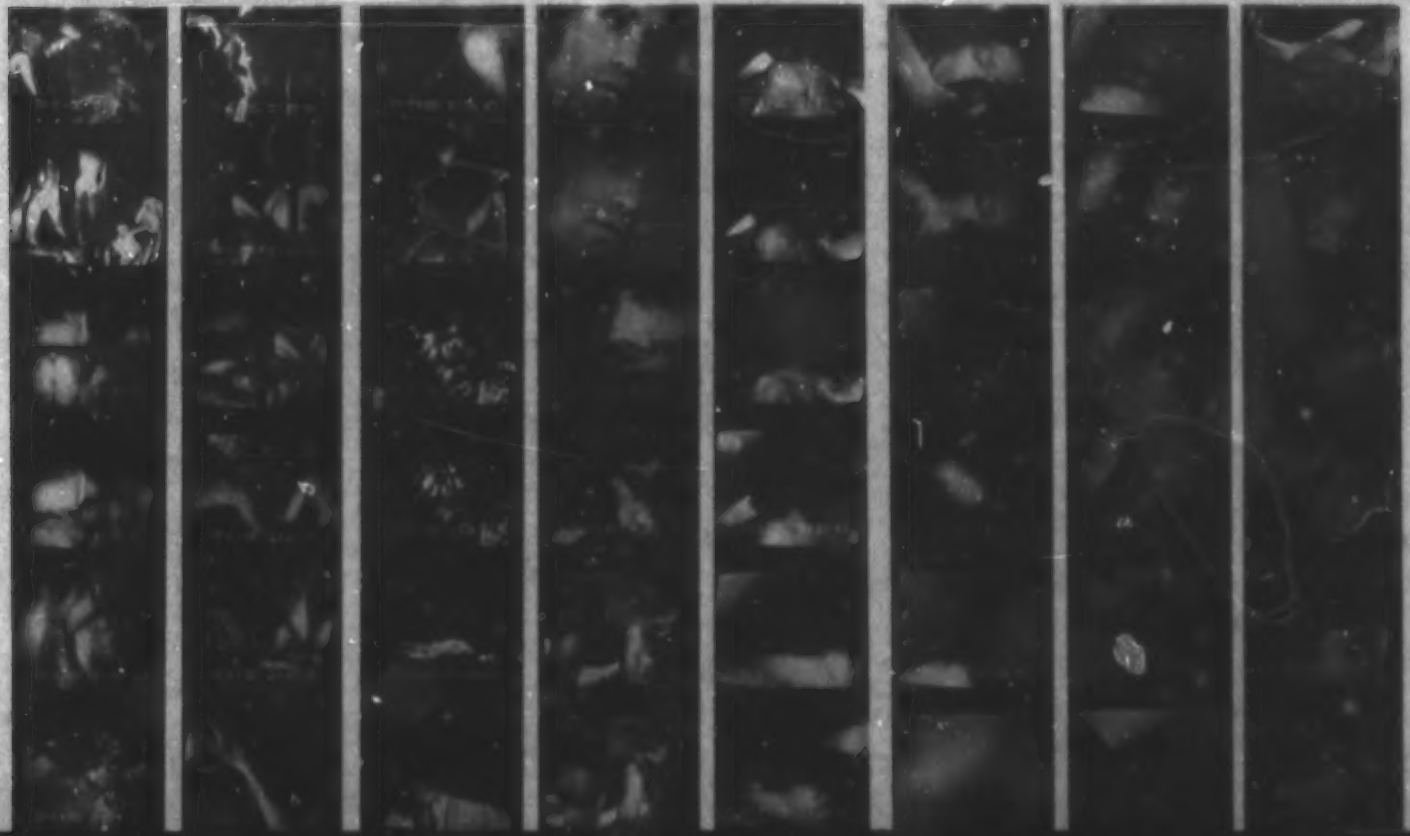
"SODOM AND GOMORRAH - THE LAST SEVEN DAYS": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. L.P. #5011) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO CINEMA 7, INC. (DATE OF ISSUANCE: NOV. 14, 1975).





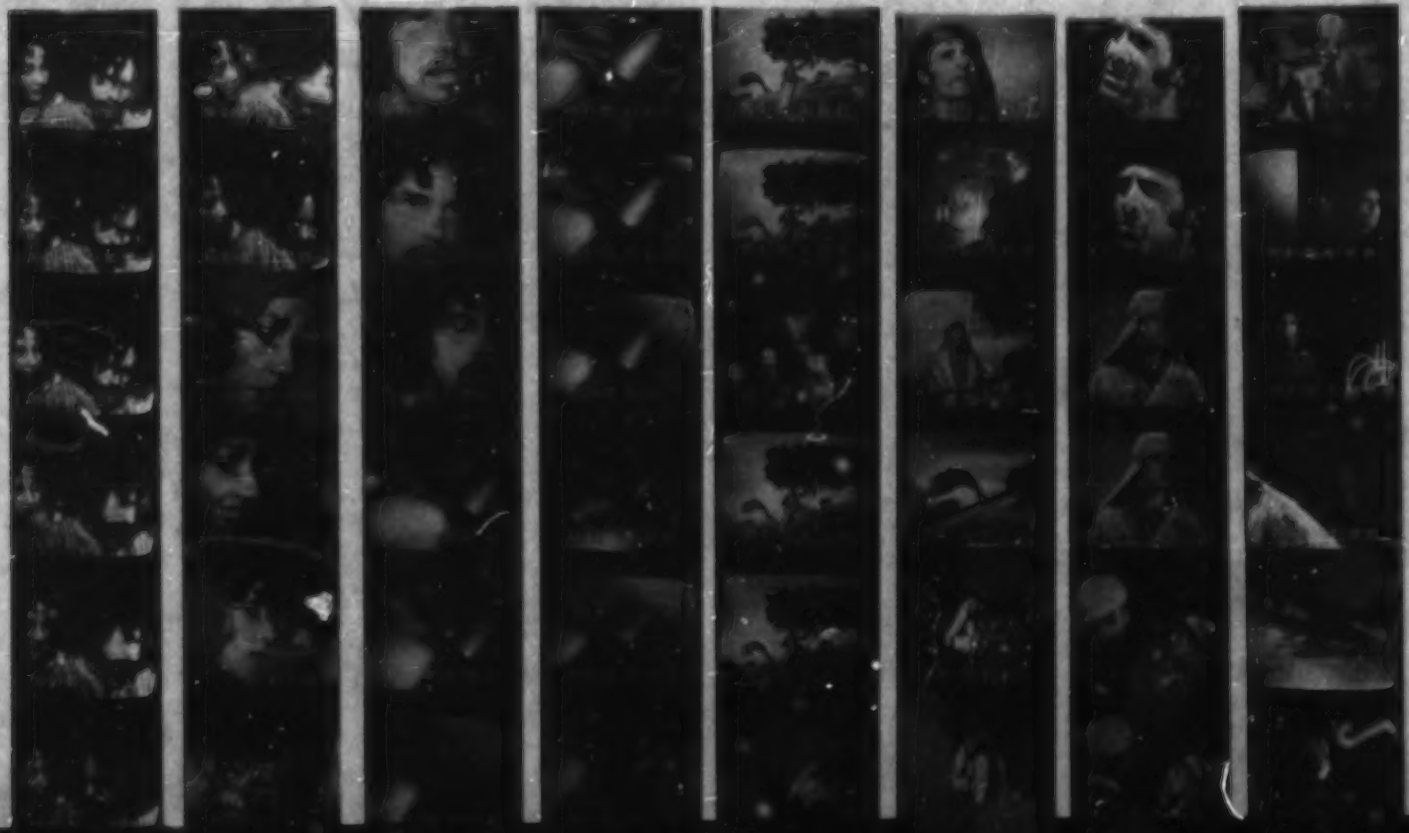
"SODOM AND GOMORRAH"
PART 15 OF 18 PARTS
(119:16-124:52) GROUP OF MALES AND FEMALES BY FIRE. MAN FROM SPACE SHIP FIGHTS WITH LONG-HAIRED, SHAGGY EARTHLING. THEY HAVE FIGHT AROUND FIRE.

"SODOM AND GOMORRAH - THE LAST SEVEN DAYS": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. L.P. 45011) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO CINEMA 7, INC. (DATE OF ISSUANCE: NOV. 14, 1975).



"SODOM AND GOMORRAH"
PART 16 OF 18 PARTS
(L24:56-L24:59) SPACE MAN WINS FIGHT. (L25:03-L30:33) VARIOUS PEOPLE TALKING - SEXUAL ACTIVITY BETWEEN GROUPS OF MALES AND FEMALES. FELLATIO, CUNNILINGUS, SEXUAL INTERCOURSE.

"SODOM AND GOMORRAH - THE LAST SEVEN DAYS": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. L.P. 45011) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO CINEMA 7, INC. (DATE OF ISSUANCE: NOV. 14, 1975).



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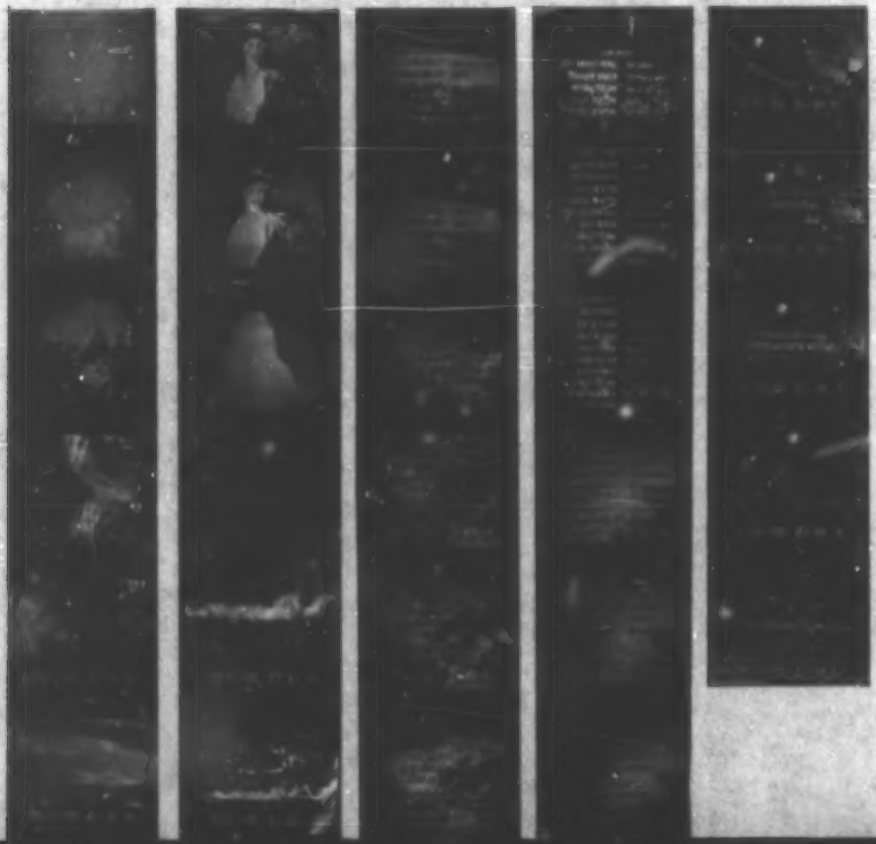
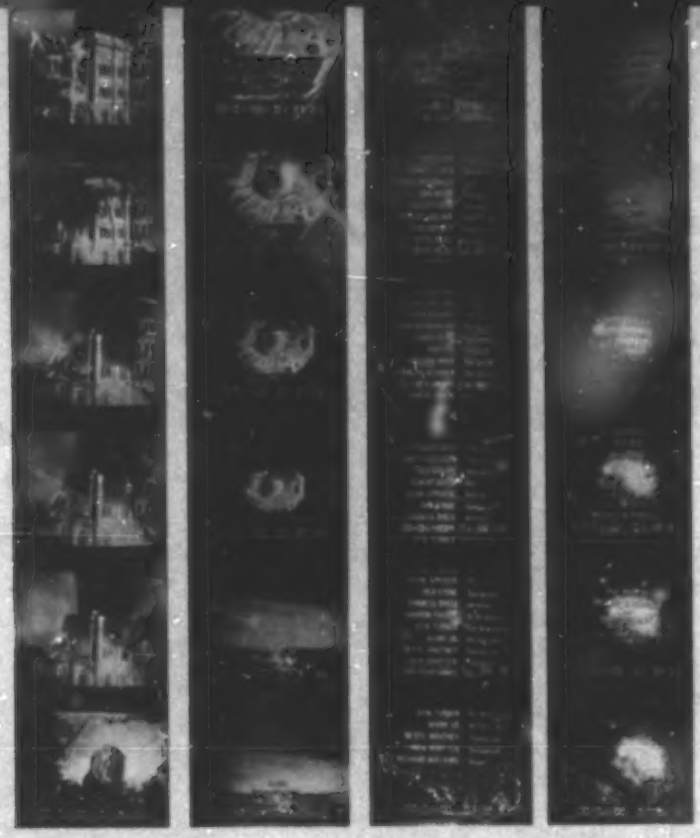
"SODOM AND GOMORRAH"
PART 17 OF 18 PARTS
(I30:36-I33:20) KING OF SODOM IN SEXUAL INTERCOURSE. (I33:23-I36:14) SCENE SHIFTS OUTDOORS. LOT AND FAMILY LEAVE SODOM. FEMALE TALKS TO SPACEMAN. SPACE MONKEY IN SPACESHIP DECIDES TO DESTROY SODOM.

D-95

"SODOM AND GOMORRAH - THE LAST SEVEN DAYS": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. L.P. 45011) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO CINEMA 7, INC. (DATE OF ISSUANCE: NOV. 14, 1975).





"SODOM AND GOMORRAH"
PART 18 OF 18 PARTS
(1:36:17-1:36:56) SCENES OF SODOM BLOWN UP BY A BOMB. (1:37:00-1:39:22) LOT'S WIFE LOOKS BACK AND TURNS TO SALT. SPACE SHIP SHOWN GOING OFF IN SPACE AS CREDITS APPEAR AND FEATURE ENDS.

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APPENDIX D

TIME-MOTION STUDY* OF THE FILM

"THE AUTOBIOGRAPHY OF A FLEA"

The motion picture film "The Autobiography of a Flea" was issued a "Certificate of Registration of a Claim to Copyright" by the Copyright Office on Oct. 12, 1976.

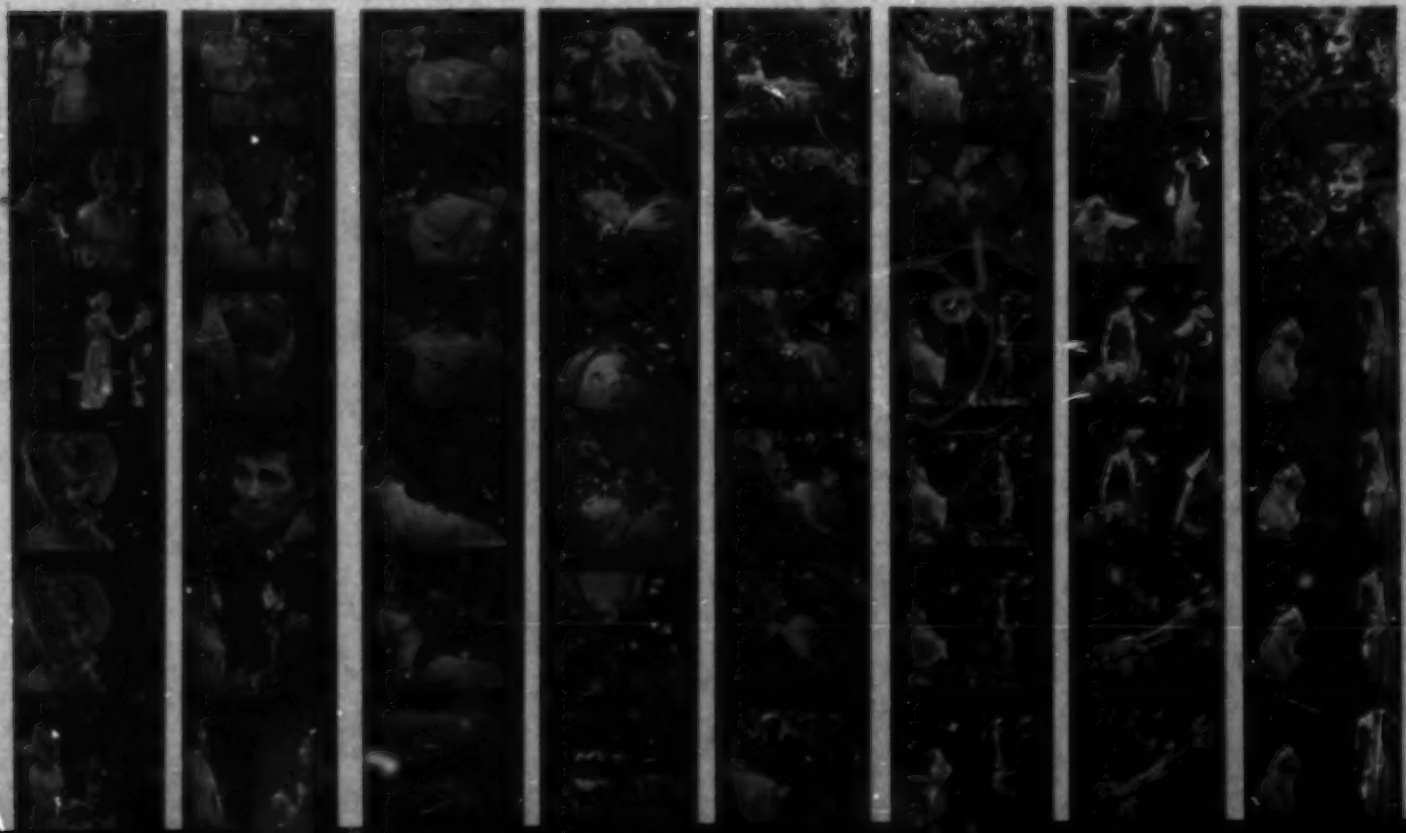
* A time-motion study is a chronological series of still photographs of a motion picture film, timed in their relative order of appearance, which, by "stopping" the movement appearing on the motion picture screen and recording the same, permits the type of conduct being portrayed thereon to be analyzed in a fair and accurate manner. Photographs have been taken every 3.6 seconds playing time.

"THE AUTOBIOGRAPHY OF A FLEA": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. L.P. 46834) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO MOOKS, INC. (DATE OF ISSUANCE: OCT. 12, 1976).

D-100

"THE AUTOBIOGRAPHY OF A FLEA"
PART 1 OF 17 PARTS
(00:05-01:22) PRESENT THE TITLE AND A SHORT INTRODUCTION. AN UNSEEN FLEA NARRATES ON AND OFF THROUGHOUT THE FILM. THE FLEA HAS MADE HIS HOME IN THE VAGINA OF A 14 YEAR OLD GIRL. THE SETTING IS IN OLD FRANCE AROUND THE SEVENTEEN HUNDRED'S. (01:26-04:37) DEPICT THE 14 YEAR OLD EXAMINING HER BODY. THE NARRATOR FLEA INDICATES THAT THE FEMALE IS A VIRGIN. (04:41-05:32) DEPICT THE 14 YEAR OLD FEMALE AND THE MOTHER IN CHURCH AND A YOUNG MALE SITTING IN A PEW. THEN SCENE SHIFTS OUTSIDE.

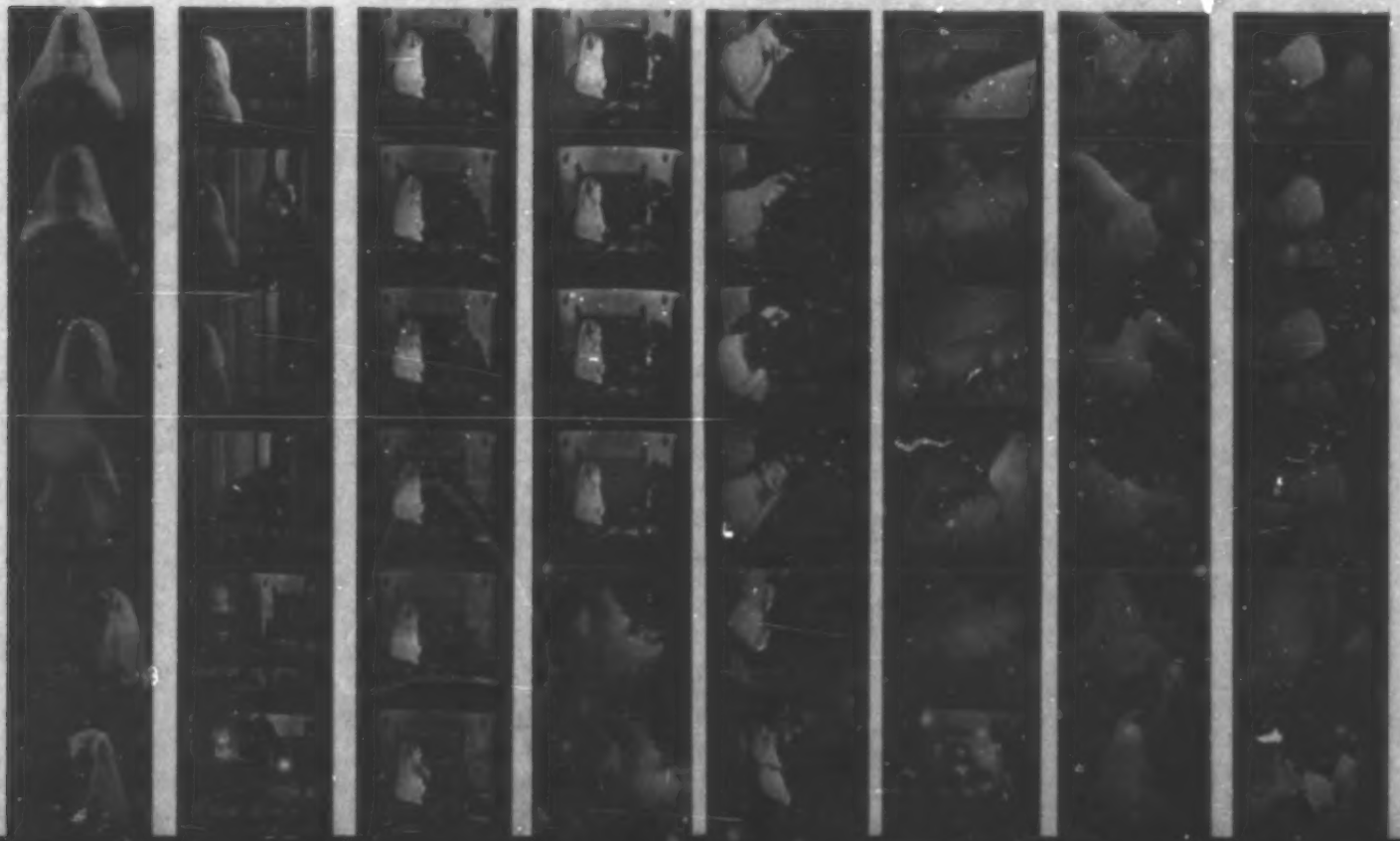
"THE AUTOBIOGRAPHY OF A FLEA": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. L.P. 46834) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO MOOKS, INC. (DATE OF ISSUANCE: OCT. 12, 1976).



D-103

"THE AUTOBIOGRAPHY OF A FLEA"
PART 2 OF 17 PARTS
(05:40-06:53) DEPICT THE YOUNG GIRL AND THE MOTHER LEAVING CHURCH AND THE YOUNG MAN PASSING HER A NOTE WHICH SAID MEET HER IN THE GARDEN. THE YOUNG MALE AND FEMALE ARE IN THE GARDEN. (06:57-08:10) THEY ENGAGE IN AN ACT OF SEXUAL INTERCOURSE ON A BENCH. THE NARRATOR INDICATES THAT THIS IS THE FIRST EXPERIENCE FOR BOTH. (08:14-10:22) A MONK HIDING IN THE BUSHES CATCHES THE PAIR AND CHASTISES THEM. (10:26-10:54) THE MONK TELLS THE YOUNG FEMALE THAT SHE MUST VISIT HIS QUARTERS WHERE HE WILL ASSIST HER IN GETTING RID OF THIS PARTICULAR SIN. (10:57-11:11) DEPICT THE FEMALE VISITING THE MONK'S QUARTERS.

"THE AUTOBIOGRAPHY OF A FLEA": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. L.P. 46834) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO HOOKS, INC. (DATE OF ISSUANCE: OCT. 12, 1976).



D-104

D-105

"THE AUTOBIOGRAPHY OF A FLEA"
PART 3 OF 17 PARTS
(11:15-13:48) THE MONK TELLS HER SHE MUST DO EVERYTHING HE SAYS SO SHE WILL BE SAVED. (13:52-13:55) HE KISSES THE 14 YEAR OLD FEMALE. (13:59-15:33) THE MONK ENGAGING IN CUNNILINGUS WITH THE YOUNG FEMALE, LYING ACROSS THE TABLE. (15:36-16:23) THE MONK TELLS THE YOUNG FEMALE THAT SHE CAN MASTURBATE HIM (NOT IN THOSE PARTICULAR TERMS) SHE BEGINS TO MASTURBATE THE MONK'S PENIS. (16:25-16:46) THE YOUNG FEMALE FELLATES THE MONK.

"THE AUTOBIOGRAPHY OF A FLEA": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. L.P. 46834) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO MOOKS, INC. (DATE OF ISSUANCE: OCT. 12, 1976).

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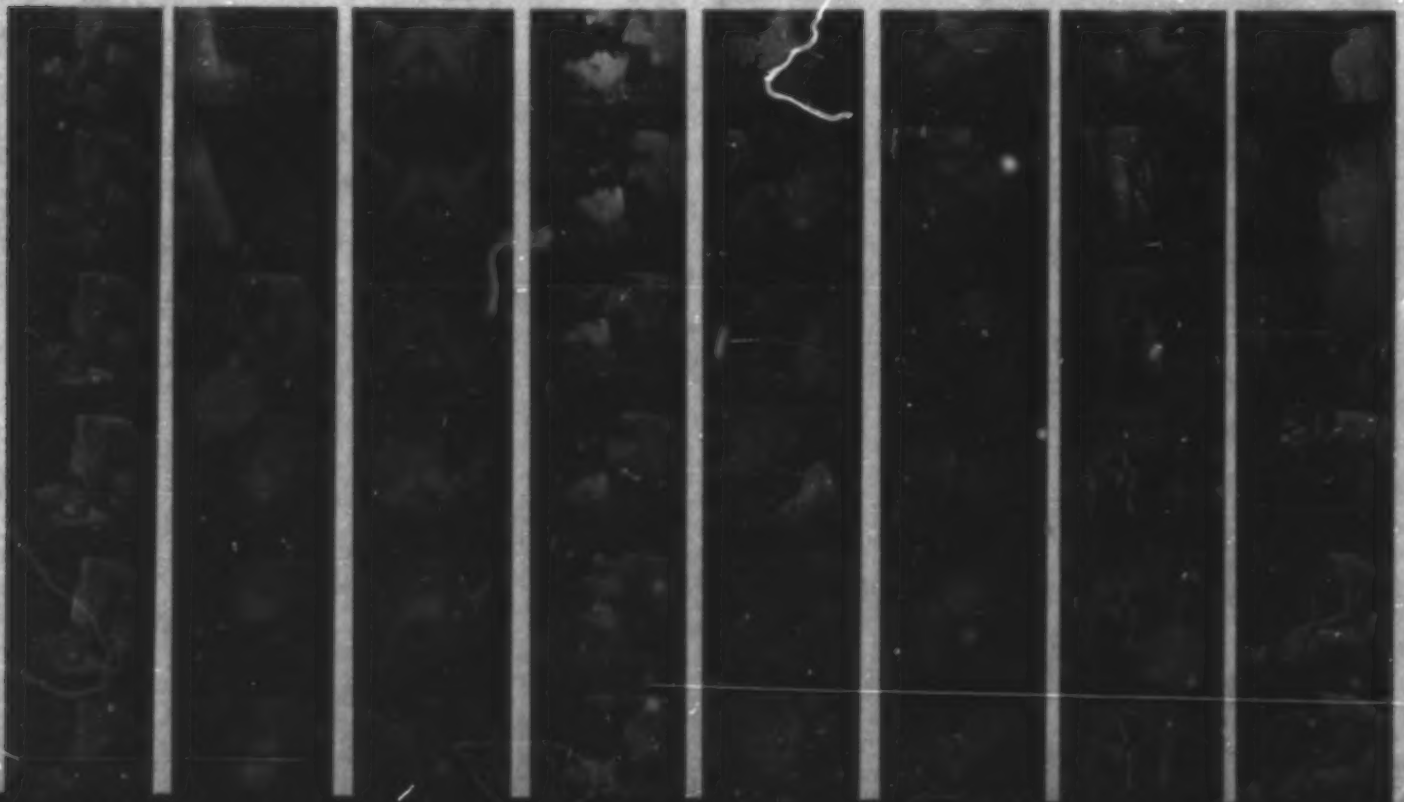
"THE AUTOBIOGRAPHY OF A FLEA"
PART 4 OF 17 PARTS
(16:49-17:10) FELLATIO CONTINUES. (17:14-19:03) THE YOUNG FEMALE DISROBES. (18:06-19:54) THE MONK ENGAGES IN SEXUAL INTERCOURSE WITH THE YOUNG FEMALE. (19:58-21:07) TWO OTHER MONKS ENTER SAYING "MMM--" ONE OF THE MONKS IS JOHN HOLMES. (21:11-22:21) ANOTHER MONK ENGAGES IN SEXUAL INTERCOURSE WITH THE FEMALE ON THE FLOOR

"THE AUTOBIOGRAPHY OF A FLEA": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. L.P. 46834) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO MOOKS, INC. (DATE OF ISSUANCE: OCT. 12, 1976).



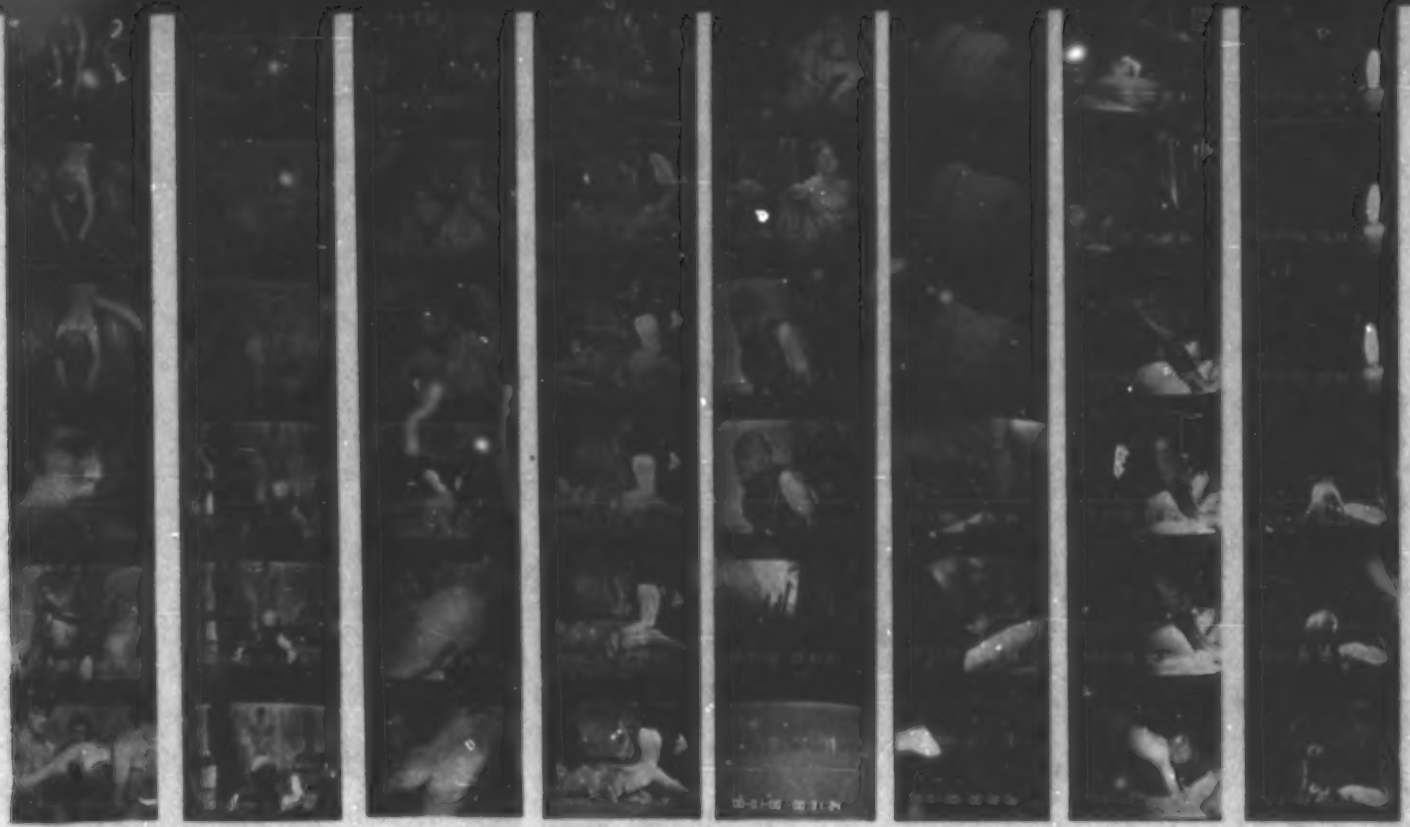
D-108

D-106

"THE AUTOBIOGRAPHY OF A FLEA"
PART 5 OF 17 PARTS
(22:24-24:57) THE SAME MONK CONTINUES TO ENGAGE IN SEXUAL INTERCOURSE WITH THE FEMALE ON THE FLOOR. (25:01-26:31) THE OTHER MONK, WHO IS ACTOR JOHN HOLMES, APPROACHES THE FEMALE AND ENGAGES IN SEXUAL INTERCOURSE WITH HER. (26:35-27:45) THE TWO MONKS, STANDING NUDE, TALK TO EACH OTHER ABOUT THE OCCURRENCE. ONE MONK TELLS THE FEMALE THAT SHE MUST DO OTHER THINGS. (27:48-27:55) THE FEMALE TURNS AND GOES ON HER KNEES ON THE FLOOR WHILE THE OTHER MONK ENGAGES IN SODOMY WITH HER.

"THE AUTOBIOGRAPHY OF A FLEA": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. L.P. 46934) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO MOOKS, INC. (DATE OF ISSUANCE: OCT. 12, 1976).

D-110



D-111

"THE AUTOBIOGRAPHY OF A FLEA"
PART 6 OF 17 PARTS
(27:59-28:51) SODOMY CONTINUES. MONKS DISCUSS FEMALE. (28:54-29:40) SCENE SHIFTS TO THE SAME FEMALE IN A ROOM WITH ONE OF THE MONKS AND HER UNCLE. (29:43-31:03) THE UNCLE DECIDES HE WILL HAVE INTERCOURSE WITH HIS NIECE, THE 14 YEAR OLD FEMALE. THE MONK HELPS THE UNCLE HOLD HER WHILE HE ATTEMPTS TO ENGAGE IN SEXUAL INTERCOURSE. (31:07-31:17) THIS POINT THE FLEA BITES THE PENIS OF THE UNCLE WHICH STOPS THE ACTIVITY. THE FEMALE RUNS OUT OF THE ROOM. (31:21-33:30) THE NIECE IS SLEEPING. THE UNCLE COMES INTO THE BEDROOM AND PULLS THE COVERS BACK EXPOSING HER NUDE BODY. SHE THEN RAPES HIM (SUPPOSEDLY) ON THE BED, AND ENGAGES IN SEXUAL INTERCOURSE WITH THE FEMALE SUPERIOR.

"THE AUTOBIOGRAPHY OF A FLEA": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. L.P. 46834) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO MOOKS, INC. (DATE OF ISSUANCE: OCT. 12, 1976).

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"THE AUTOBIOGRAPHY OF A FLE."
PART 7 OF 17 PARTS
(33:33-33:40) INTERCOURSE CONTINUES. (33:44-34:05) THE OUTDOOR SCENE SHOWING TWO YOUNG FEMALES TALKING. ONE OF THE FEMALES IS THE 14 YEAR OLD GIRL, THE OTHER GIRL IS HER FRIEND, WHO IS ALSO SUPPOSEDLY A TEENAGER. (34:09-35:49) THE FRIEND'S FATHER JOINS THEM IN DANCING AND PLAYING ON A LAWN. (35:53-38:47) THE SCENE SHIFTS TO THE ORIGINAL 14 YEAR OLD IN THE NUDE WITH HER UNCLE AND A MONK DRINKING CHAMPAGNE WITH STRAWBERRIES. THEY ARE TALKING ABOUT A PLAN TO TRICK THE FATHER OF THE OTHER YOUNG GIRL INTO HAVING SEX WITH HIS DAUGHTER WITHOUT HIM KNOWING IT. (38:51-39:05) DEPICTS THE WIFE OF THE UNCLE OF THE FIRST YOUNG GIRL SITTING IN THE BEDROOM, DRINKING COFFEE OR COCOA, AND PREPARING TO GO TO BED.

"THE AUTOBIOGRAPHY OF A FLEA": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. L.P. 46834) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO MOOKS, INC. (DATE OF ISSUANCE: OCT. 12, 1976).

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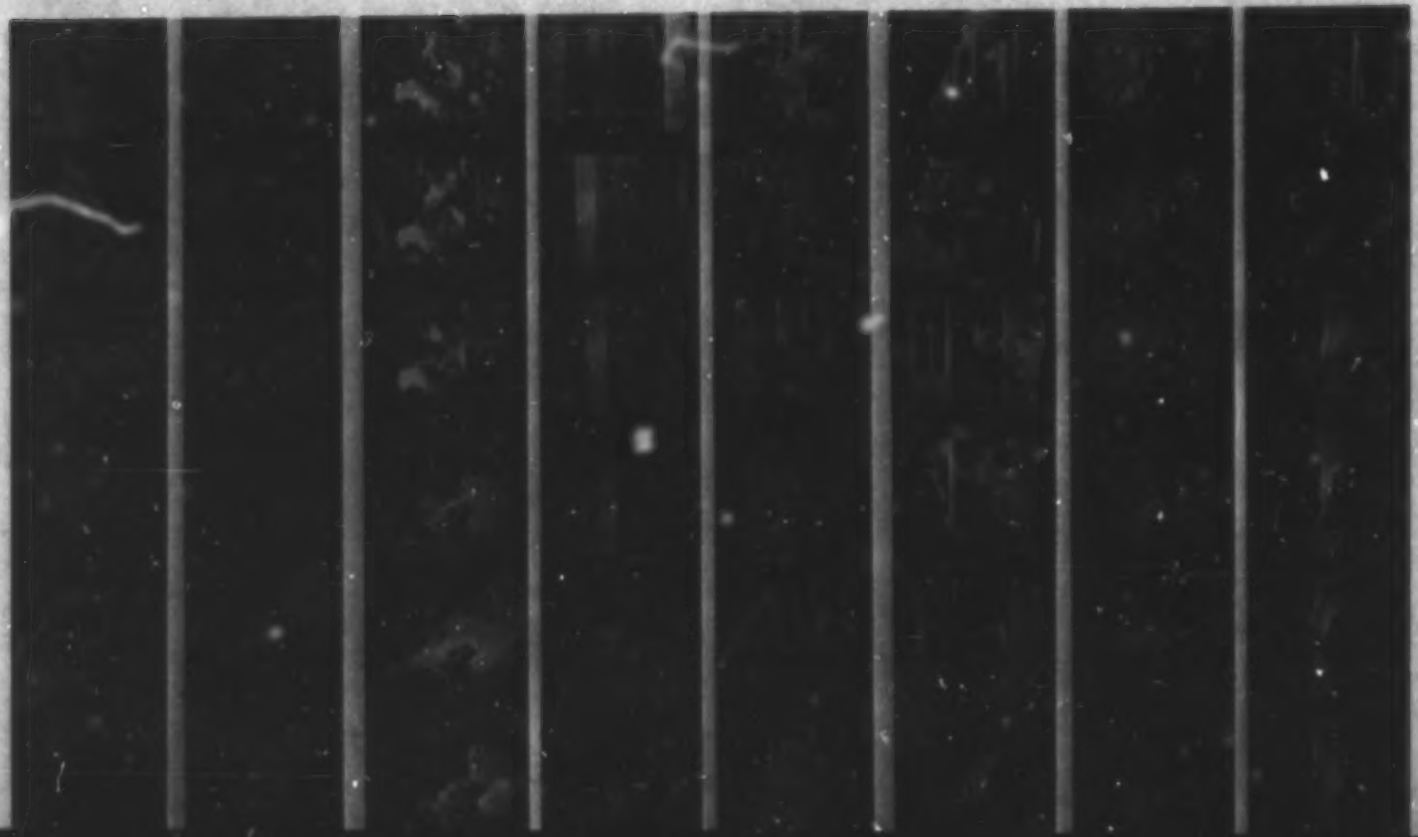
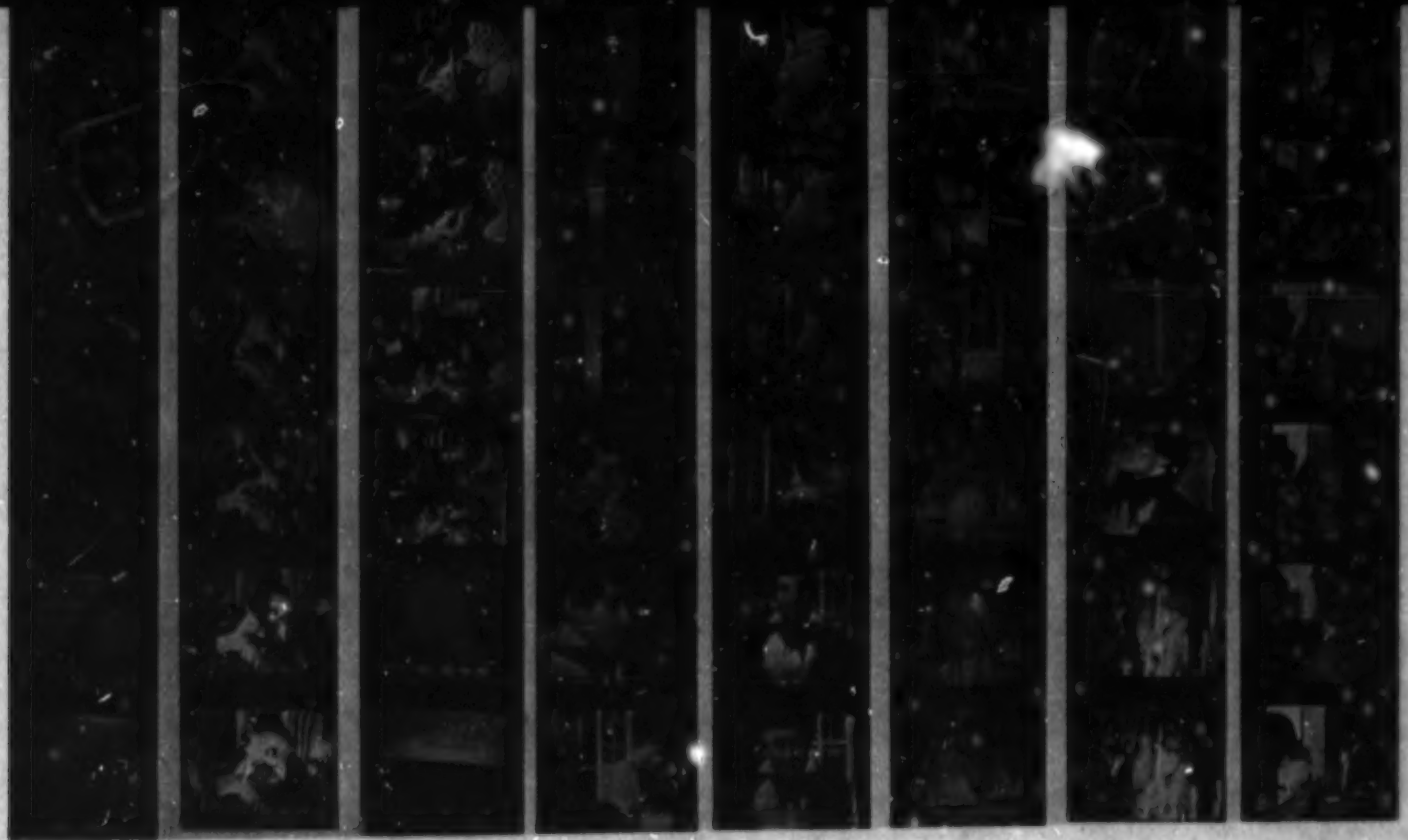
"THE AUTOBIOGRAPHY OF A FLEA"
PART 8 OF 17 PARTS
(39:09-41:56) SHE GETS IN BED AS "MONK" JOHN HOLMES CLIMBS UP THE BALCONY IN SEARCH OF THE 14 YEAR OLD DAUGHTER BUT UNWITTINGLY CLIMBS INTO THE BEDROOM OF THE WIFE OF THE GIRL'S UNCLE. (41:59-44:40) HE GETS INTO BED WITH HER AND PERFORMS CUNNILINGUS ON HER AND SEXUAL INTERCOURSE.

"THE AUTOBIOGRAPHY OF A FLEA": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. L.P. 46834) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO MOOKS, INC. (DATE OF ISSUANCE: OCT. 12, 1976).





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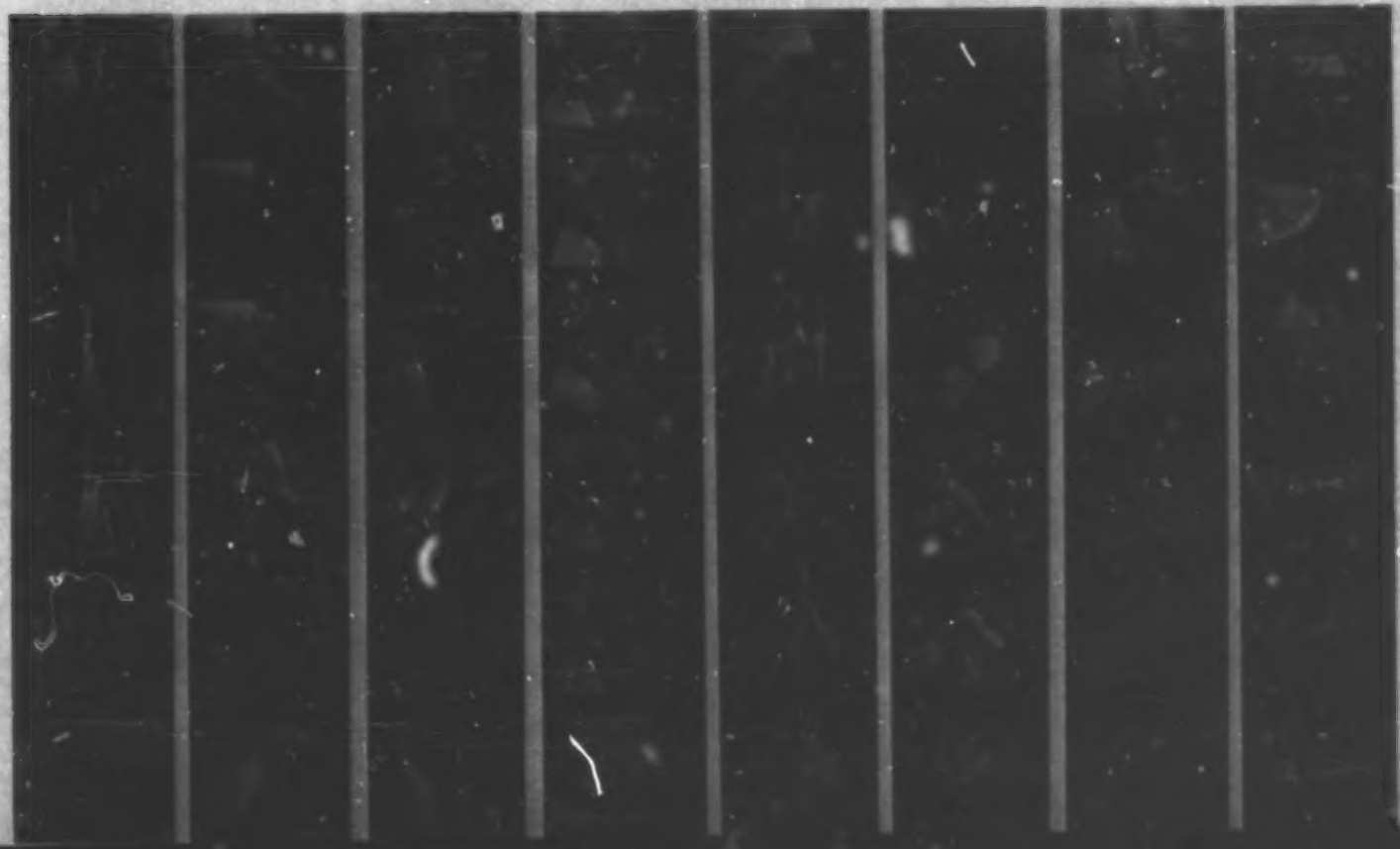
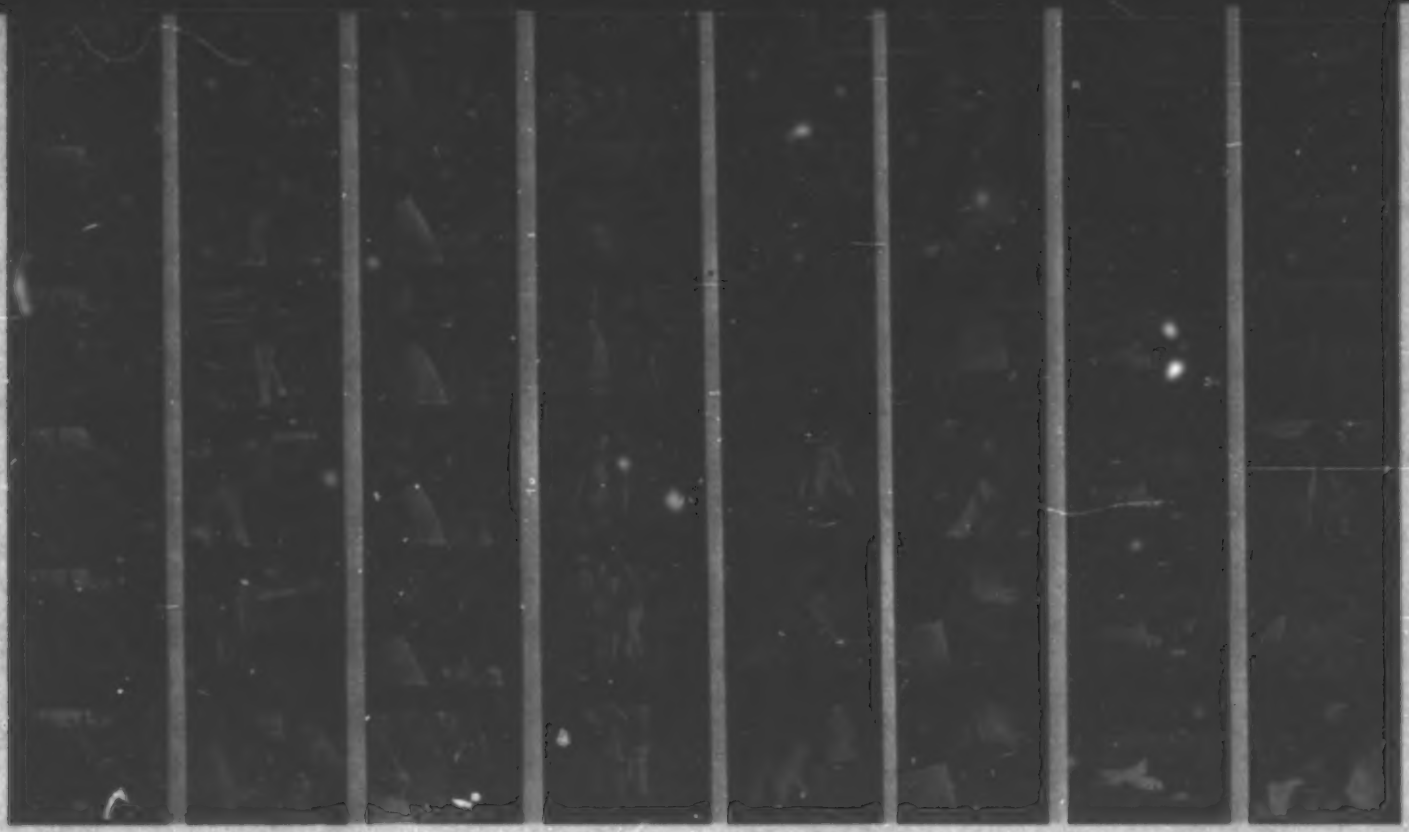
"THE AUTOBIOGRAPHY OF A FLEA"
PART 9 OF 17 PARTS
(44:43-46:00) HE ENGAGES IN SEXUAL INTERCOURSE WITH HER. (46:03-46:21) THE HUSBAND (UNCLE) OF THE WOMAN ENTERS AND CHASES JOHN HOLMES AROUND THE BED. JOHN HOLMES JUMPS OUT THE WINDOW. (46:24-46:42) THE UNCLE RETURNS TO HIS WIFE'S BEDSIDE. (46:45-50:14) SCENE SHIFTS TO THE SECOND YOUNG GIRL'S HOUSE WHERE THE FIRST GIRL MEETS THE FATHER OF HER GIRLFRIEND, THEY FLIRT AND TALK.

"THE AUTOBIOGRAPHY OF A FLEA": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. L.P. 46834) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO MOOKS, INC. (DATE OF ISSUANCE: OCT. 12, 1976).





"THE AUTOBIOGRAPHY OF A FLEA"
PART 10 OF 17 PARTS
(50:18-50:28) IS THE ENDING OF THE MEETING BETWEEN THE YOUNG GIRL'S FATHER AND HER GIRLFRIEND. (50:32-51:07) AN OUTDOOR SCENE SHOWING THE 14 YEAR OLD GIRL WALKING IN A FIELD. (51:10-51:35) DEPICT HER LOOKING ON A BANK AND SEEING A MALE MASTURBATE. THE MALE SEES HER AND PULLS HIS PANTS UP. (51:38-52:51) HE TALKS TO HER AND TELLS HER HE WOULD LIKE TO HAVE INTERCOURSE WITH HER USING THE WORD "FUCK." (52:55-55:49) SHE BEGINS TO HAVE SEXUAL INTERCOURSE WITH HIM ON THE GRASS AS THE YOUNG MAN'S FATHER ENTERS THE SCENE AND URGES HIM ON.

"THE AUTOBIOGRAPHY OF A FLEA": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. L.P. 46834) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO MOOKS, INC. (DATE OF ISSUANCE: OCT. 12, 1976).

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"THE AUTOBIOGRAPHY OF A FLEA"
PART 11 OF 17 PARTS
(55:53-56:38) THE INTERCOURSE BETWEEN THE SON AND THE FEMALE ON THE GRASS CONTINUES WHILE THE FATHER URGES THE SON ON. (56:41-60:42) THE SCENE SHIFTS TO THE YOUNG 14 YEAR OLD FEMALE AND HER GIRLFRIEND TALKING ABOUT SEX. FLASHBACK SCENES OF GIRLFRIEND AND ONE OF THE MONKS TOGETHER.

"THE AUTOBIOGRAPHY OF A FLEA": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. L.P. 46834) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO MOOKS, INC. (DATE OF ISSUANCE: OCT. 12, 1976).

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"THE AUTOBIOGRAPHY OF A FLEA"
PART 12 OF 17 PARTS
(60:46-61:52) FLASHBACK SCENES OF GIRLFRIEND AND MONK. THEY DEPICT FURTHER CONVERSATION BETWEEN T . TWO GIRLS. THE 14 YEAR OLD TELLING THE GIRLFRIEND THAT SHE SHOULD HAVE SEX. (61:56-62:51) UNCLE'S HOUSE. THEY HAVE ARRANGED FOR THE FATHER OF THE GIRL TO HAVE SEX WITH THE GIRL. HE DOES NOT REALIZE IT WILL BE HIS DAUGHTER. (62:55-64:23) DEPICTS THE DAUGHTER LYING ON A BED WITH HER HEAD COVERED. THE FATHER ENTERS THE ROOM AND BEGINS TO MASTURBATE HIS DAUGHTER NOT REALIZING THAT IT IS HIS DAUGHTER. (64:27-66:10) DEPICTS THE FATHER STILL MASTURBATING HIS DAUGHTER, HER HEAD IS COVERED. HE DISROBES AND ENGAGES IN SEXUAL INTERCOURSE WITH HER. (66:13-66:35) 14 YEAR OLD FEMALE IS WATCHING FROM BEHIND CURTAIN.

"THE AUTOBIOGRAPHY OF A FLEA": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. L.P. 46834) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO MOOKS, INC. (DATE OF ISSUANCE: OCT. 12, 1976).

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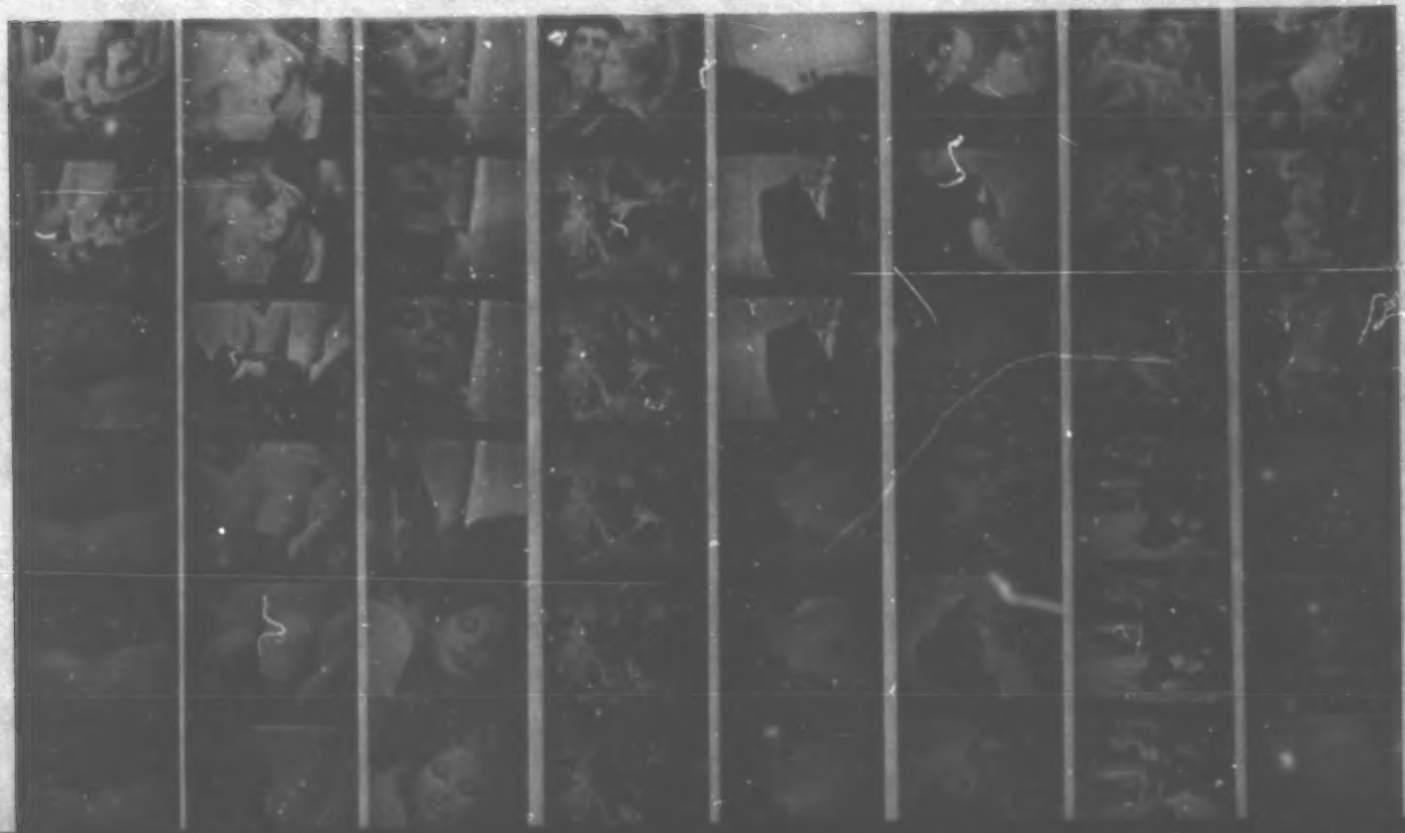
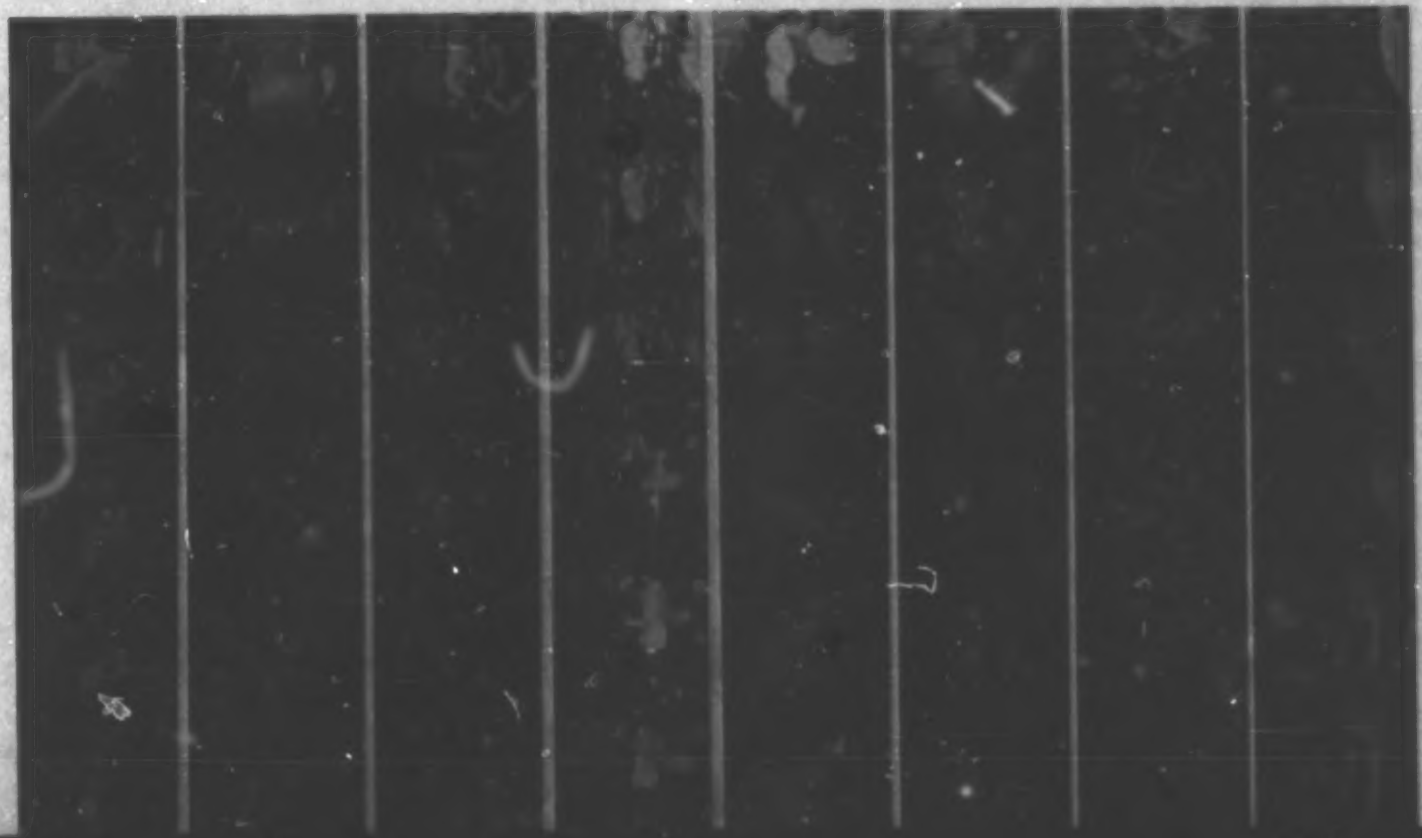
"THE AUTOBIOGRAPHY OF A FLEA"
PART 13 OF 17 PARTS
(66:39-68:51) THE FATHER CONTINUES TO ENGAGE IN SEXUAL INTERCOURSE WITH HIS DAUGHTER. HE REMOVES HIS PENIS FROM HER VAGINA AND EJACULATES ON HER STOMACH. (68:55-69:47) MALE LOOKS UP TO SEE 14 YEAR OLD FEMALE WATCHING. SHE LEAVES AND HE FOLLOWS. (69:50-70:27) SHE THEN MEETS THE FATHER IN ANOTHER ROOM, TELLS HIM HE WAS ENGAGING IN INTERCOURSE WITH HIS DAUGHTER. (70:31-72:28) FEMALE CONTINUES TO TALK ABOUT HOW THE FATHER ENGAGED IN INTERCOURSE WITH HIS OWN DAUGHTER. HE THEN ENGAGES IN INTERCOURSE WITH THE 14 YEAR OLD FEMALE.

"THE AUTOBIOGRAPHY OF A FLEA": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. L.P. 46834) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO MOOKS, INC. (DATE OF ISSUANCE: OCT. 12, 1976).



"THE AUTOBIOGRAPHY OF A FLEA"
PART 14 OF 17 PARTS
(72:32-74:44) THE FATHER OF THE GIRL CONTINUES TO HAVE SEXUAL INTERCOURSE WITH THE 14 YEAR OLD FEMALE. (74:48-76:27) THE UNCLE AND THE MONK BRING THE DAUGHTER OF THE MAN, LIE HER ON THE FLOOR. (76:31-78:21) THE MONK THEN BEGINS TO HAVE INTERCOURSE WITH HER WHILE HER FATHER WATCHES AND MASTURBATES.

"THE AUTOBIOGRAPHY OF A FLEA": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. L.P. 46834) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO MOOKS, INC. (DATE OF ISSUANCE: OCT. 12, 1976).



"THE AUTOBIOGRAPHY OF A FLEA"
PART 15 OF 17 PARTS
(78:25-78:43) THE FATHER CONTINUES TO MASTURBATE WHILE HE WATCHES HIS DAUGHTER ENGAGING IN SEXUAL INTERCOURSE WITH THE MONK. (78:47-79:28) THE 14 YEAR OLD ENGAGES IN SEXUAL INTERCOURSE WITH HER UNCLE IN THE SAME ROOM. (79:31-80:46) ACTIVITY CONTINUES. (80:52-82:17) DEPICTS THE FATHER ENGAGING IN SEXUAL INTERCOURSE WITH HIS DAUGHTER AND HE NOW KNOWS IT IS HIS DAUGHTER. THEY ENGAGE IN SEXUAL INTERCOURSE WHILE SHE LEANS AGAINST THE FIREPLACE. SEXUAL INTERCOURSE IS FROM THE REAR POSITION. (82:20-83:08) THE FATHER HAS A HEART ATTACK AND KEELS OVER. HE FALLS ON THE FLOOR AND THE OTHER PEOPLE IN THE ROOM DON'T REALIZE HE IS DEAD. (83:12-84:14) THE FATHER LIES DEAD ON THE FLOOR WHILE THE OTHER PEOPLE ENGAGE IN SEXUAL INTERCOURSE.

"THE AUTOBIOGRAPHY OF A FLEA":

CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. L.P. 46834) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO MOOKS, INC. (DATE OF ISSUANCE: OCT. 12, 1976).

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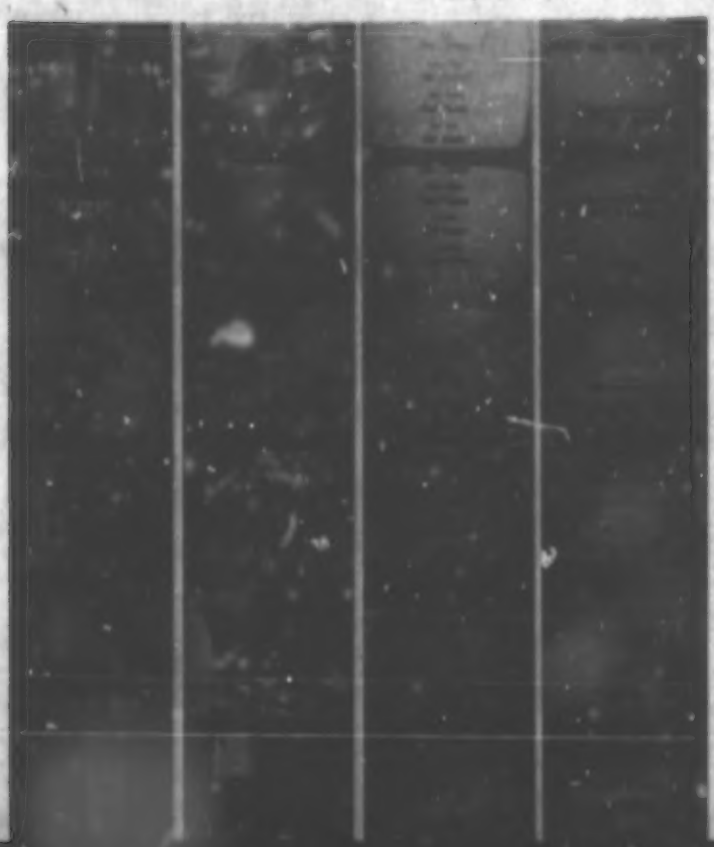
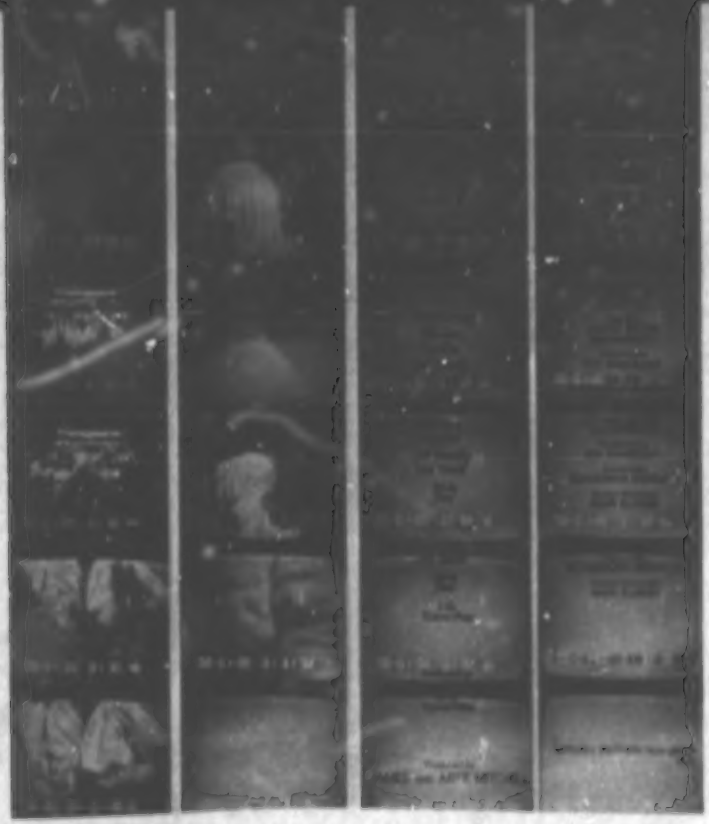
"THE AUTOBIOGRAPHY OF A FLEA"
PART 16 OF 17 PARTS
(84:18-85:46) ACTIVITY CONTINUES. (85:50-86:30) THEY REALIZE THAT THE FATHER HAS DIED. (86:34-87:07) THE SCENE SHIFTS TO WHERE THE TWO FEMALES ARE IN BED TALKING. (87:11-88:43) "MONK" HOLMES ENTERS THE ROOM AND DISROBES AND GETS INTO BED WITH THE TWO FEMALES. THEY ALL GET UNDER THE COVERS. (88:46-89:56) DEPICTS A SHIFT SHOWING THE WIFE OF THE DEAD HUSBAND WHO IS NOW SUPPOSEDLY A MENTAL CASE. (90:00-90:07) THE SCENE AGAIN SHIFTS TO THE TWO YOUNG FEMALES IN A CHURCH WITH VEILS ON. THEY ARE APPARENTLY TAKING VOWS OF CHASTITY, ENTERING A MONASTERY TO LIVE WITH THE MONK'S.

"THE AUTOBIOGRAPHY OF A FLEA": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. L.P. 46834) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO MOOKS, INC. (DATE OF ISSUANCE: OCT. 12, 1976).





"THE AUTOBIOGRAPHY OF A FLEA"
PART 17 OF 17 PARTS
(90:11-91:35) DEPICT THE END OF THE FEATURE. THE FLEA NARRATES THAT HE HAS LEFT THE VAGINA OF THE 14 YEAR OLD AND HE HAS ENTERED THE VAGINA OF ANOTHER FEMALE. (91:39-93:04) CREDITS. THE END.

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APPENDIX D

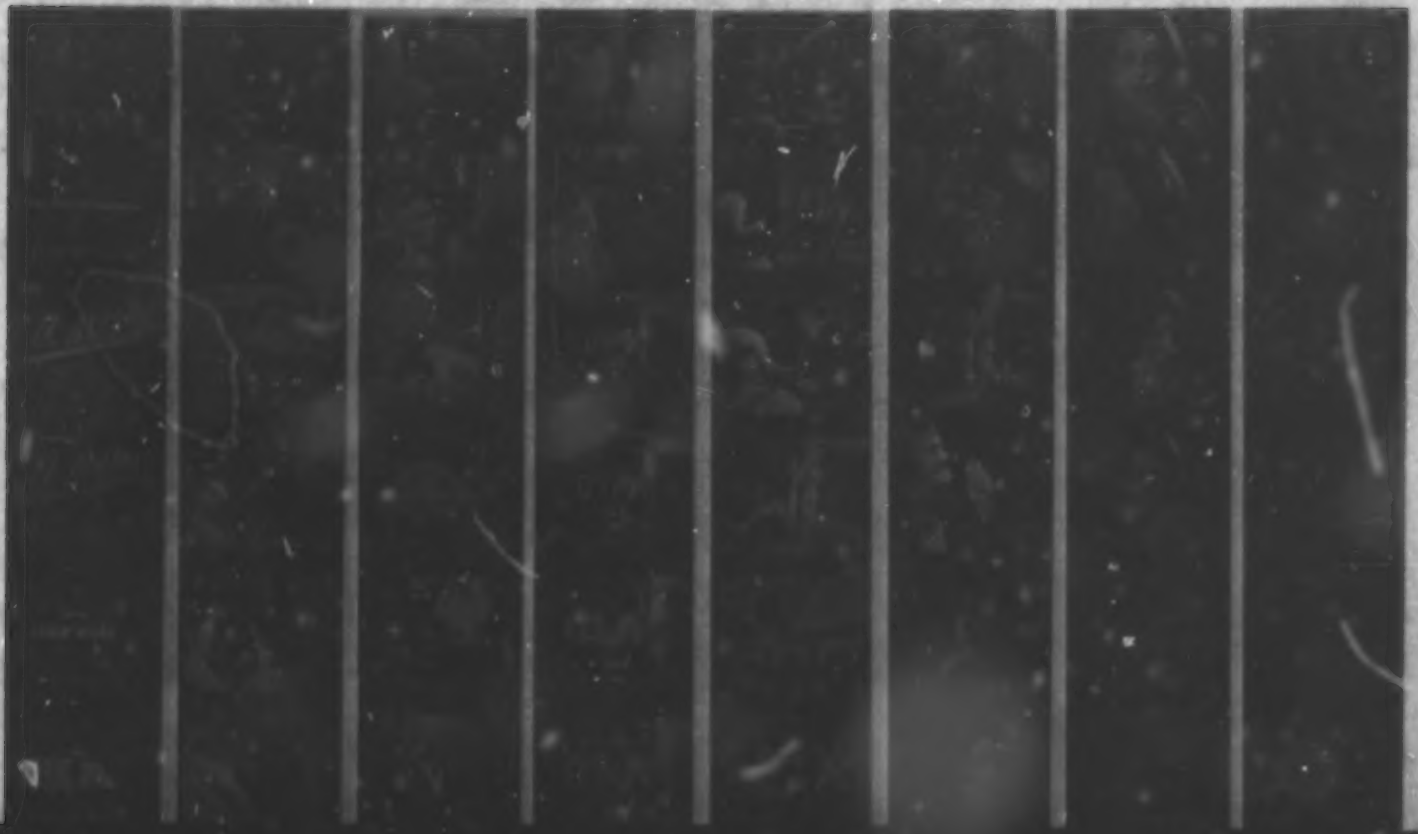
TIME-MOTION STUDY* OF THE FILM

"C.B. MAMAS"

The motion picture film "C.B. Mamas" was issued a "Certificate of Registration of a Claim to Copyright" by the Copyright Office on Nov. 11, 1976.

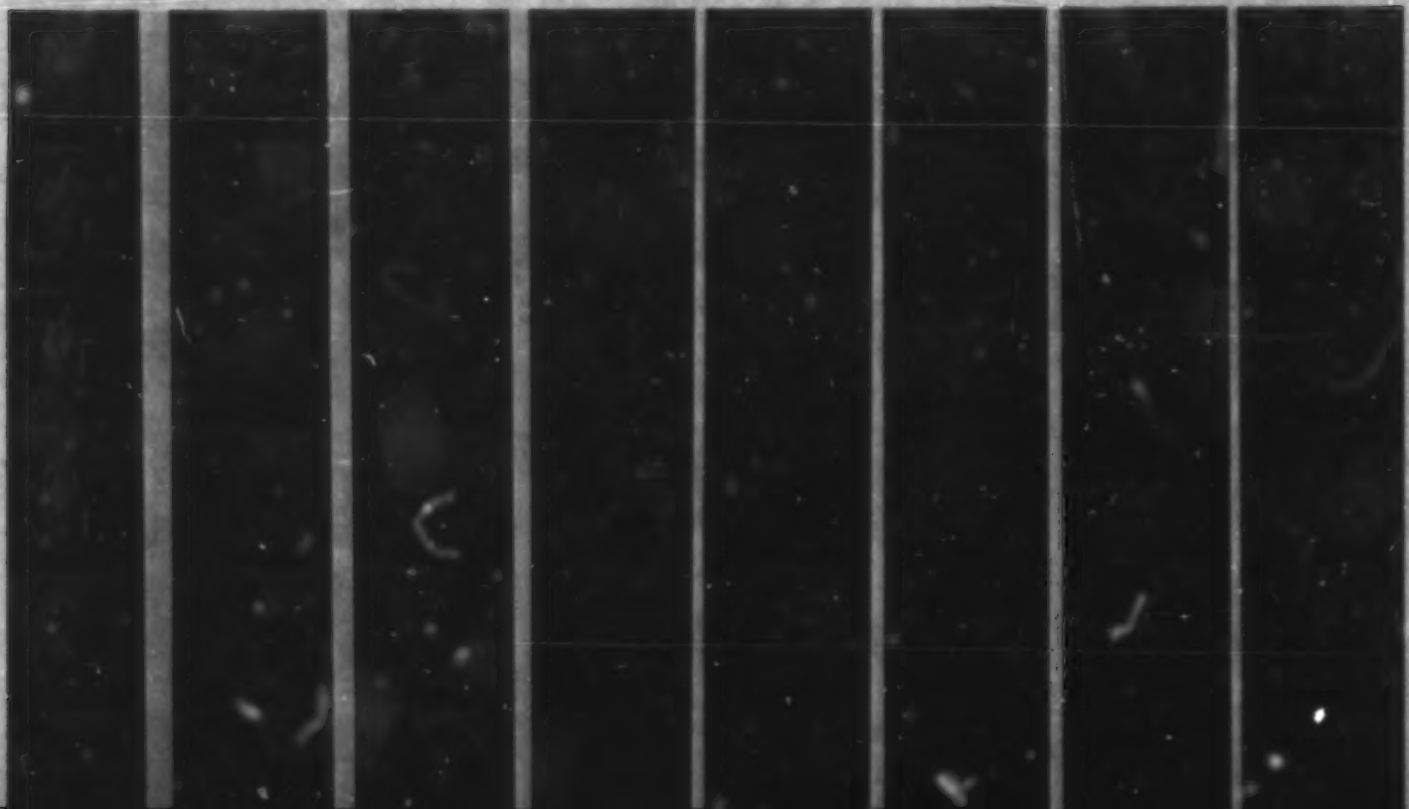
* A time-motion study is a chronological series of still photographs of a motion picture film, timed in their relative order of appearance, which, by "stopping" the movement appearing on the motion picture screen and recording the same, permits the type of conduct being portrayed thereon to be analyzed in a fair and accurate manner. Photographs have been taken every 3.6 seconds playing time.

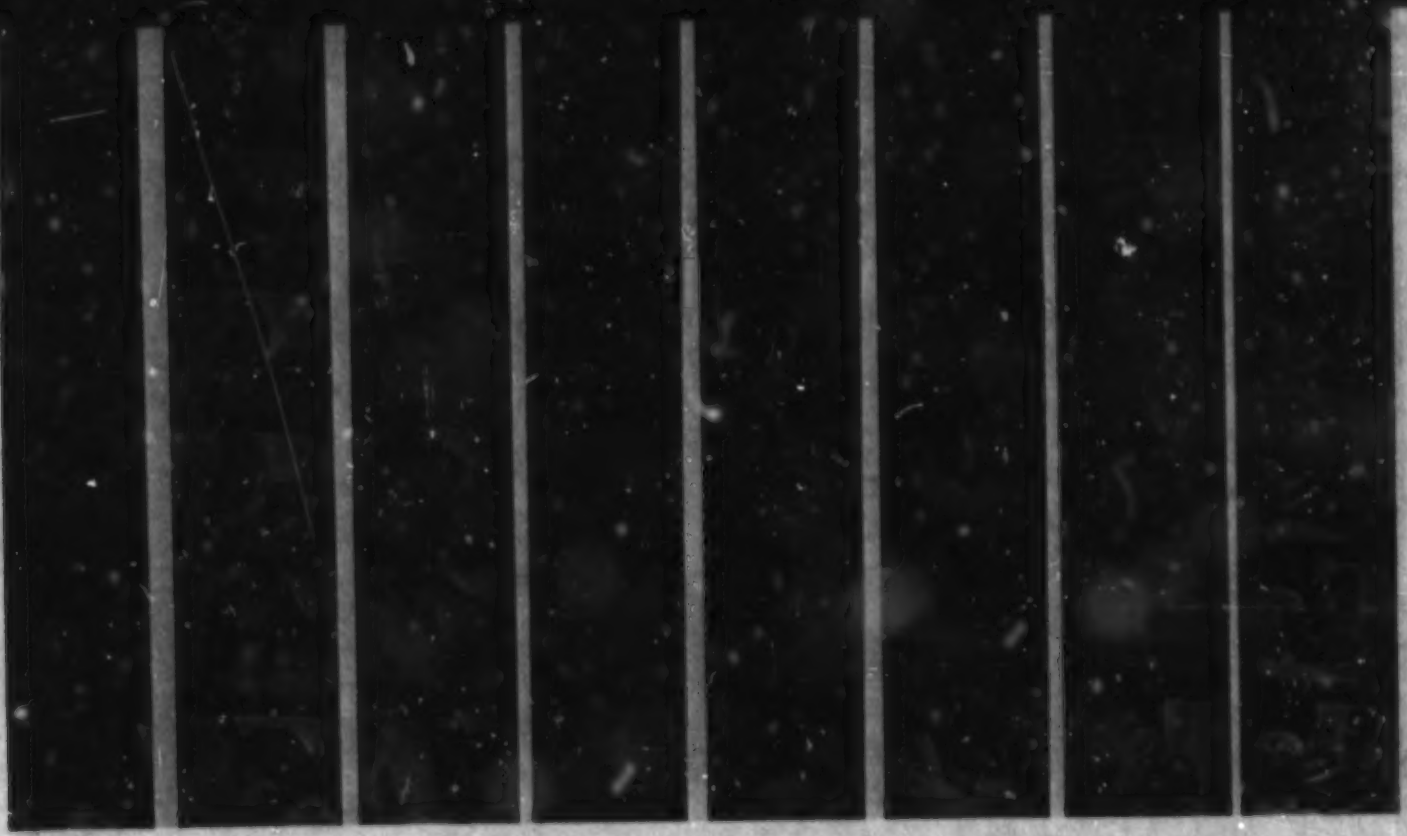
"C.B. MAMAS": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. L.P. 46891) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO HOOKS, INC. (DATE OF ISSUANCE: NOV. 11, 1976).



"C.B. MAMAS"
PART 1 OF 10 PARTS
(00:04-00:32) CREDITS. (00:35-01:17) INTRODUCTORY SCENES. (00:56-1:03) HOUSEWIFE LESLIE IN HOUSEROBE AND CURLERS PHONES GIRLFRIEND TO TELL HER THAT SHE WILL HAVE EVERYTHING READY IN 10 MINUTES. (1:07-1:17) LESLIE SAYS "GOOD-BYE" TO HER HUSBAND. (1:21-1:59) AND HASTELY CLEANS UP HOUSE FOR MEETING. (2:03-3:13) FEMALES GATHER FOR PARTY. (3:16-3:37) FOUR FEMALES MEET AND BROADCAST AN INVITATION TO MALES OVER "C.B." EQUIPMENT. (3:41-4:40) FOUR MALES RESPOND. (4:43-5:36) NAVY PILOT JUMPS FROM AN AIRPLANE. FIRST FEMALE, ON BED, EXPOSES HERSELF AS MALE IN PILOT'S UNIFORM WATCHES.

"C.B. MAMAS": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. L.P. 46891) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO MOOKS, INC. (DATE OF ISSUANCE: NOV. 11, 1976).





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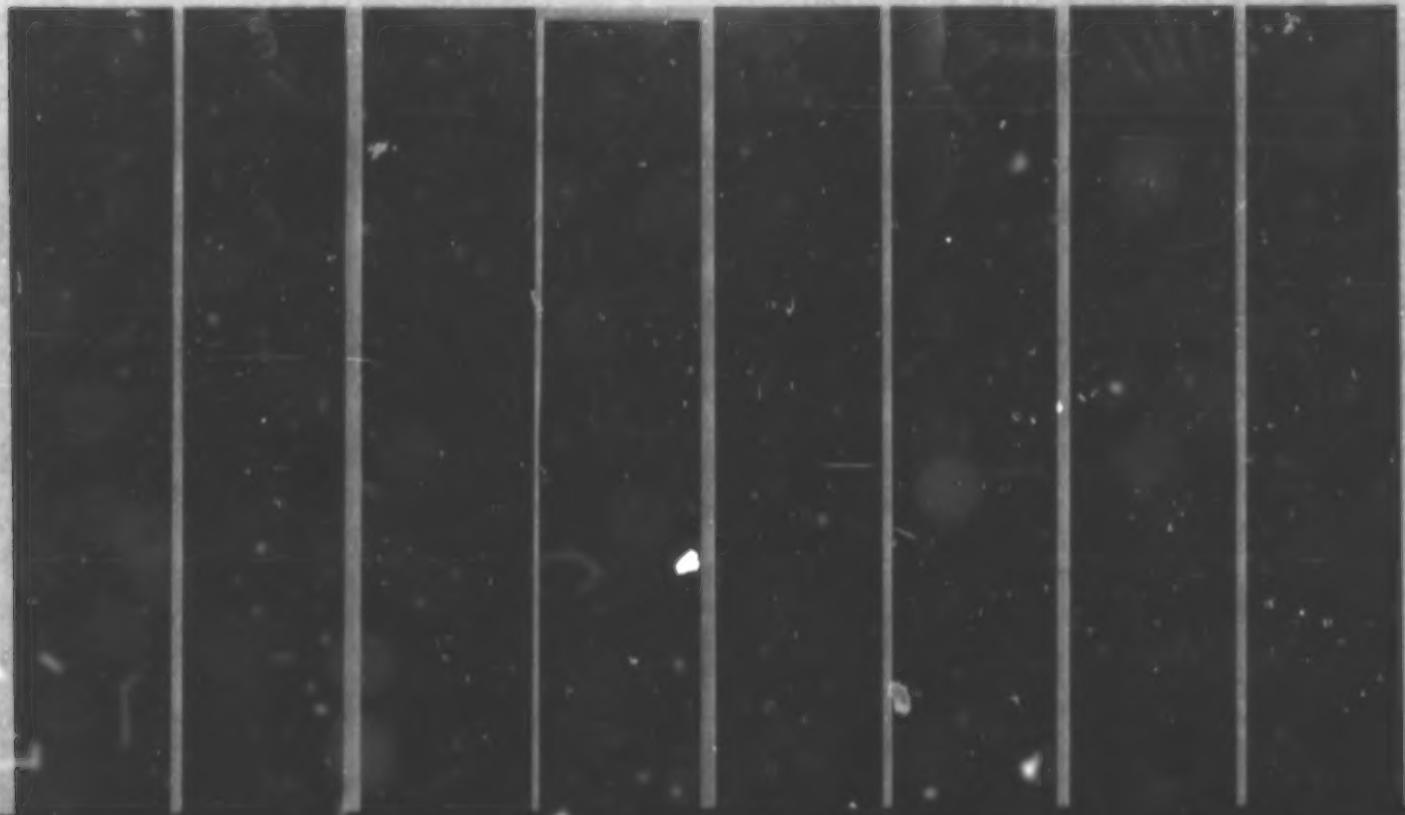
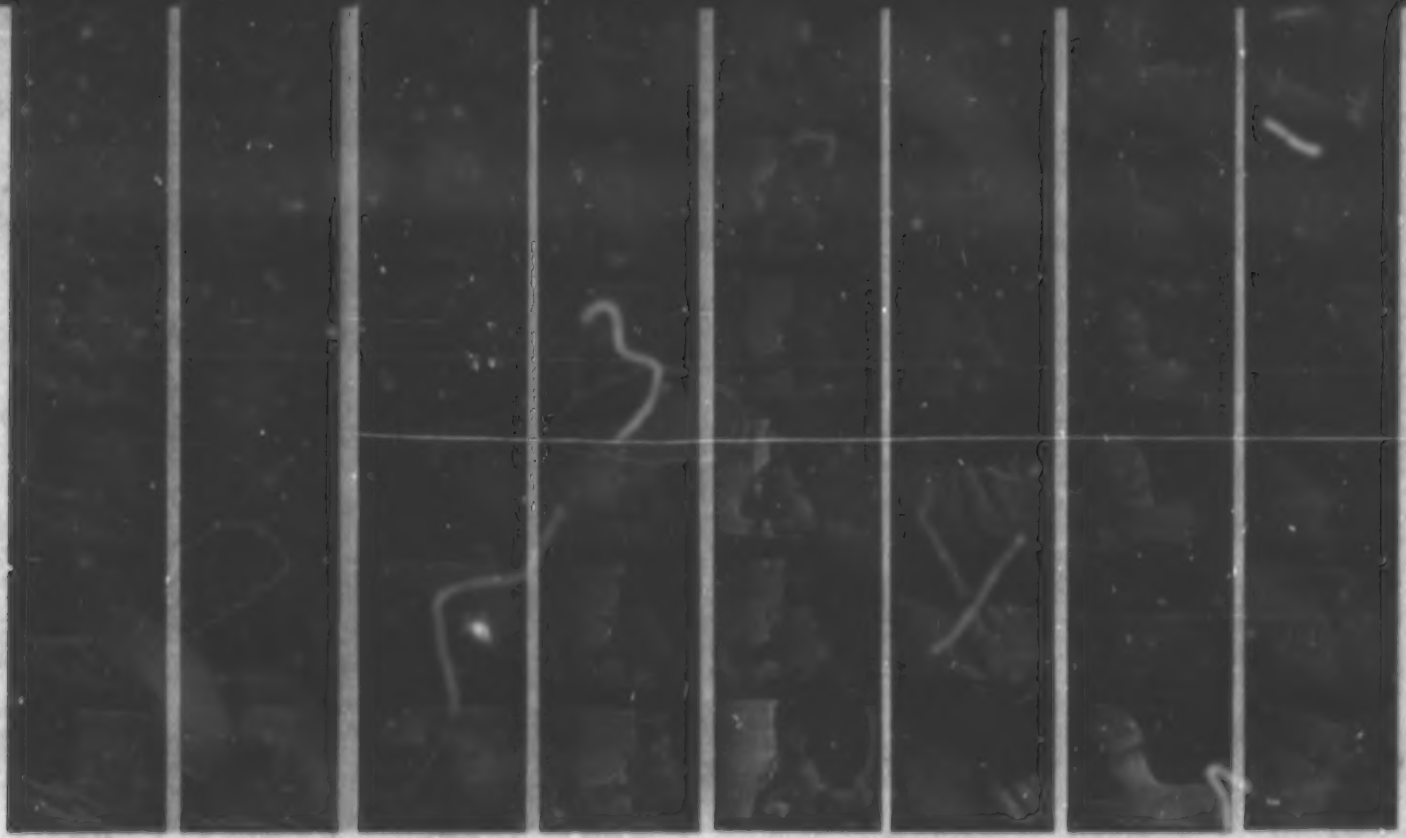
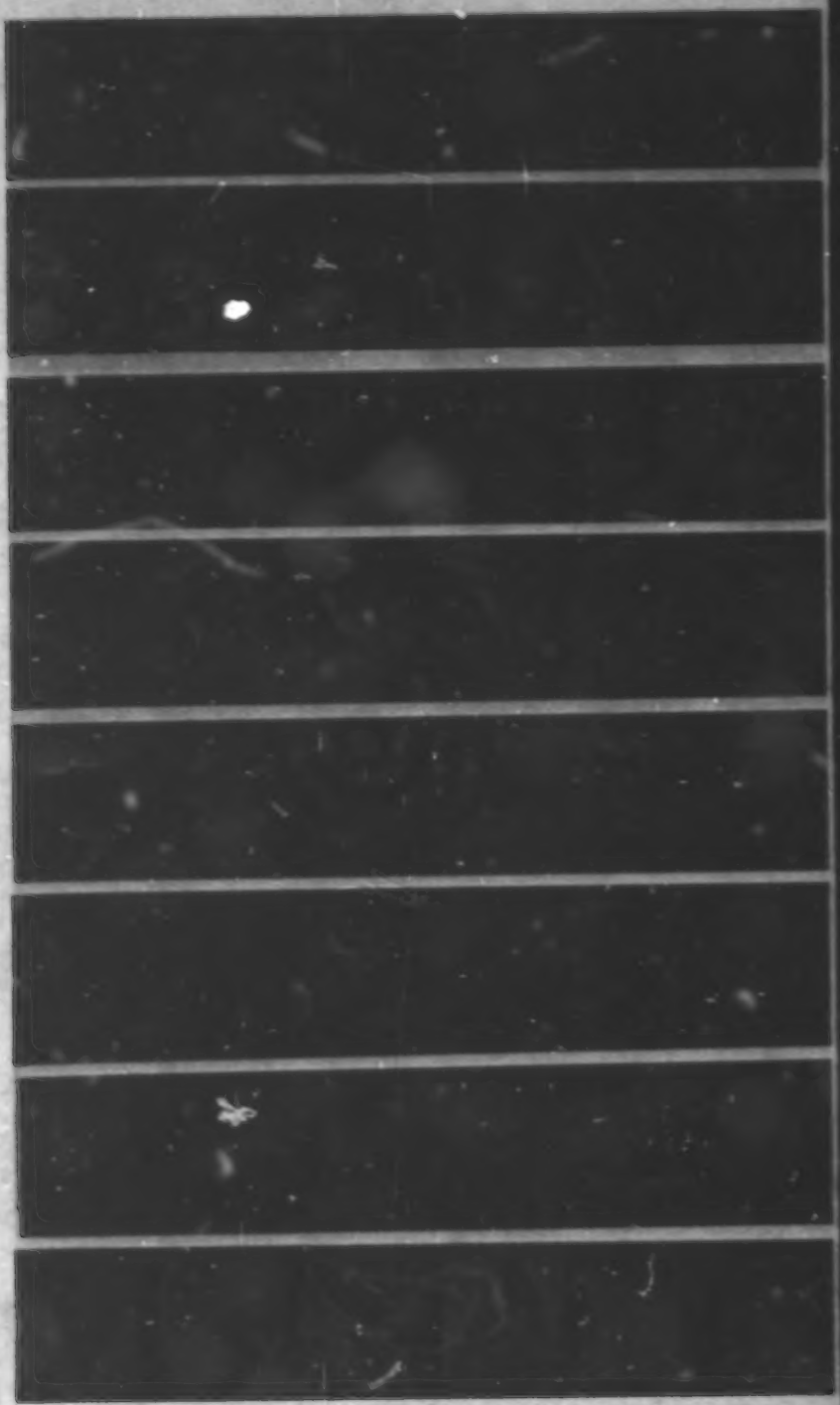
"C.B. MAMAS"
PART 2 OF 10 PARTS
(5:40-5:57) PILOT UNDRESSES AND PERFORMS CUNNILINGUS. (6:01-6:11) SEXUAL INTERCOURSE. (6:14-7:55) FEMALE PERFORMS FELLATIO ON PILOT. (7:59-9:51) FEMALE MOUNTS PILOT FOR SEXUAL INTERCOURSE. (9.55-11:11) SECOND MALE INVITES SECOND FEMALE "ITS TIME TO PLAY RUBBER DUCKY." MALE UNDRESSES FEMALE IN BATHROOM.

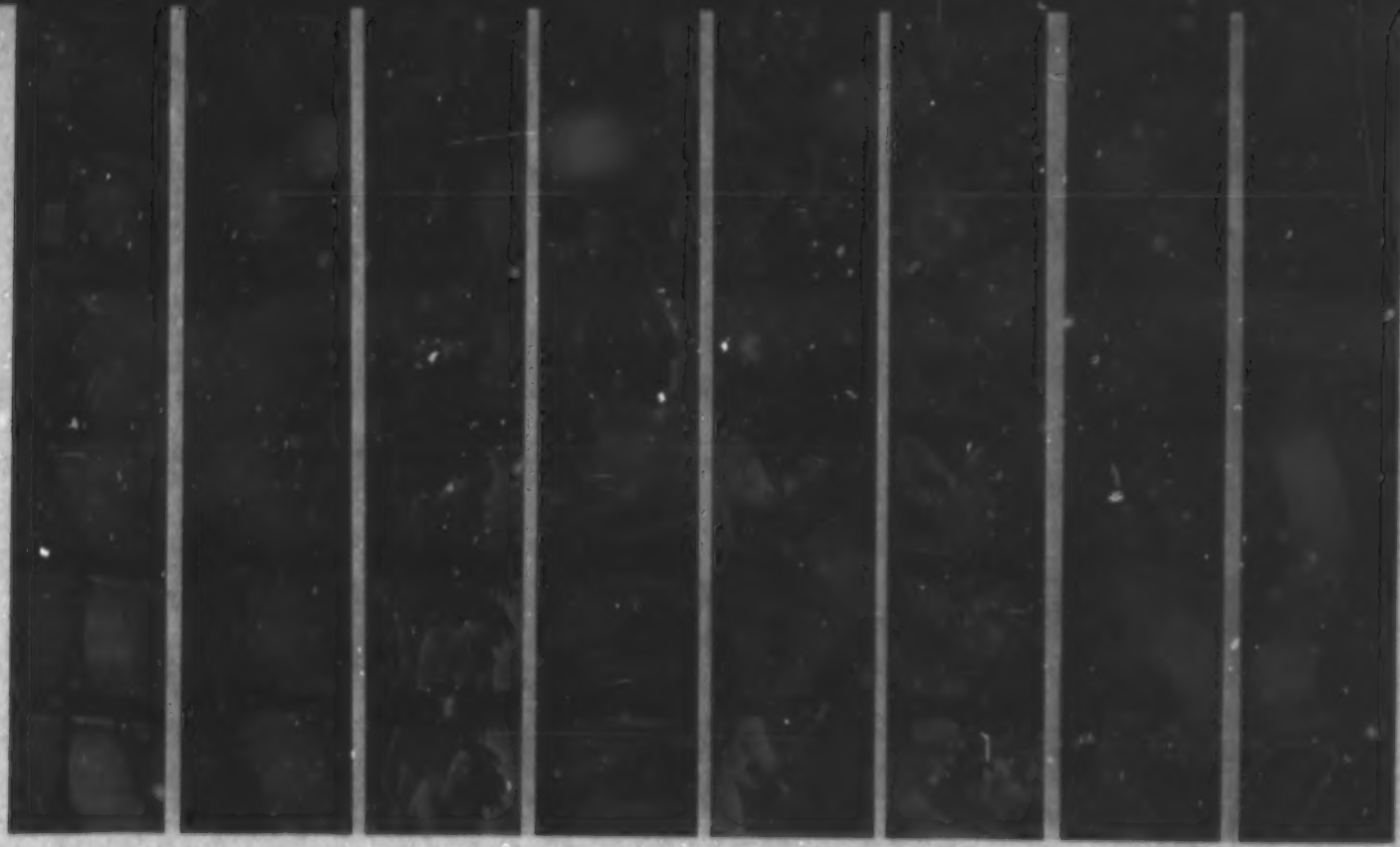
"C.B. MAMAS": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. L.P. 46691) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO MOOKS, INC. (DATE OF ISSUANCE: NOV. 11, 1976).





"C.R. MAMAS"
PART 3 OF 10 PARTS
(11:15-13:30) NUDE FEMALE, HOLDING SUCKER, IS IN TUB AS SECOND MALE BEGINS SCRUBBING HER BREASTS, THIGH, FEET AND VAGINA. (13:42-15:12) SECOND FEMALE PERFORMS FELLATIO ON SECOND MALE. (15:15-16:47) SECOND MALE AND SECOND FEMALE ENGAGE IN SEXUAL INTERCOURSE WITH MALE RECLINING.





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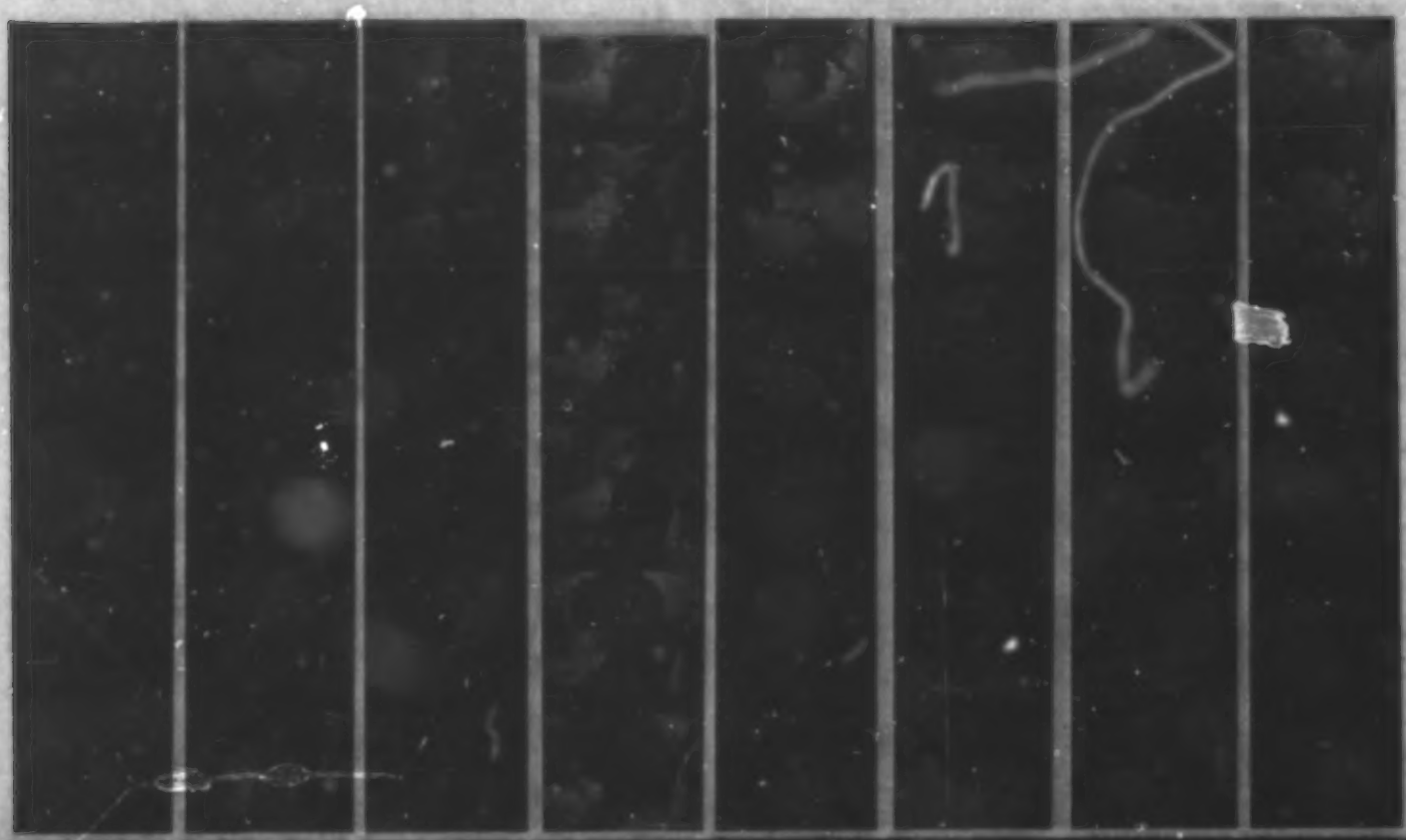
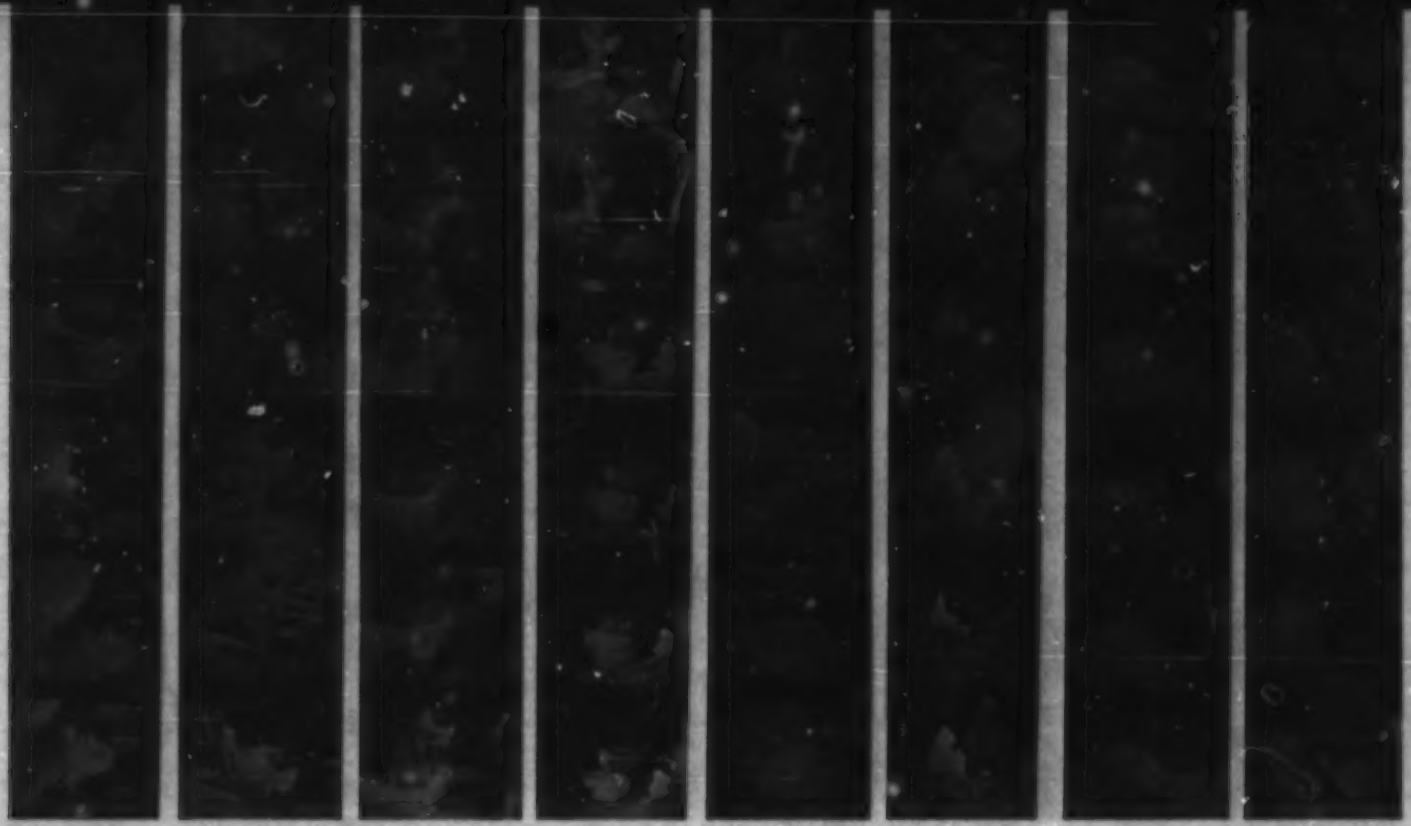
"C.B. MAMAS"
PART 4 OF 10 PARTS
(16:50-17:01) EJACULATION. (17:04-19:55) THIRD MALE ENGAGES THIRD FEMALE IN SEXUAL INTERCOURSE FROM THE REAR. (19:59-21:12) FELLATIO. (21:16-22:22) SEXUAL INTERCOURSE WITH FEMALE RECLINING.

"C.B. MAMAS": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. L.P. 46891) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO MOOKS, INC. (DATE OF ISSUANCE: NOV. 11, 1976).





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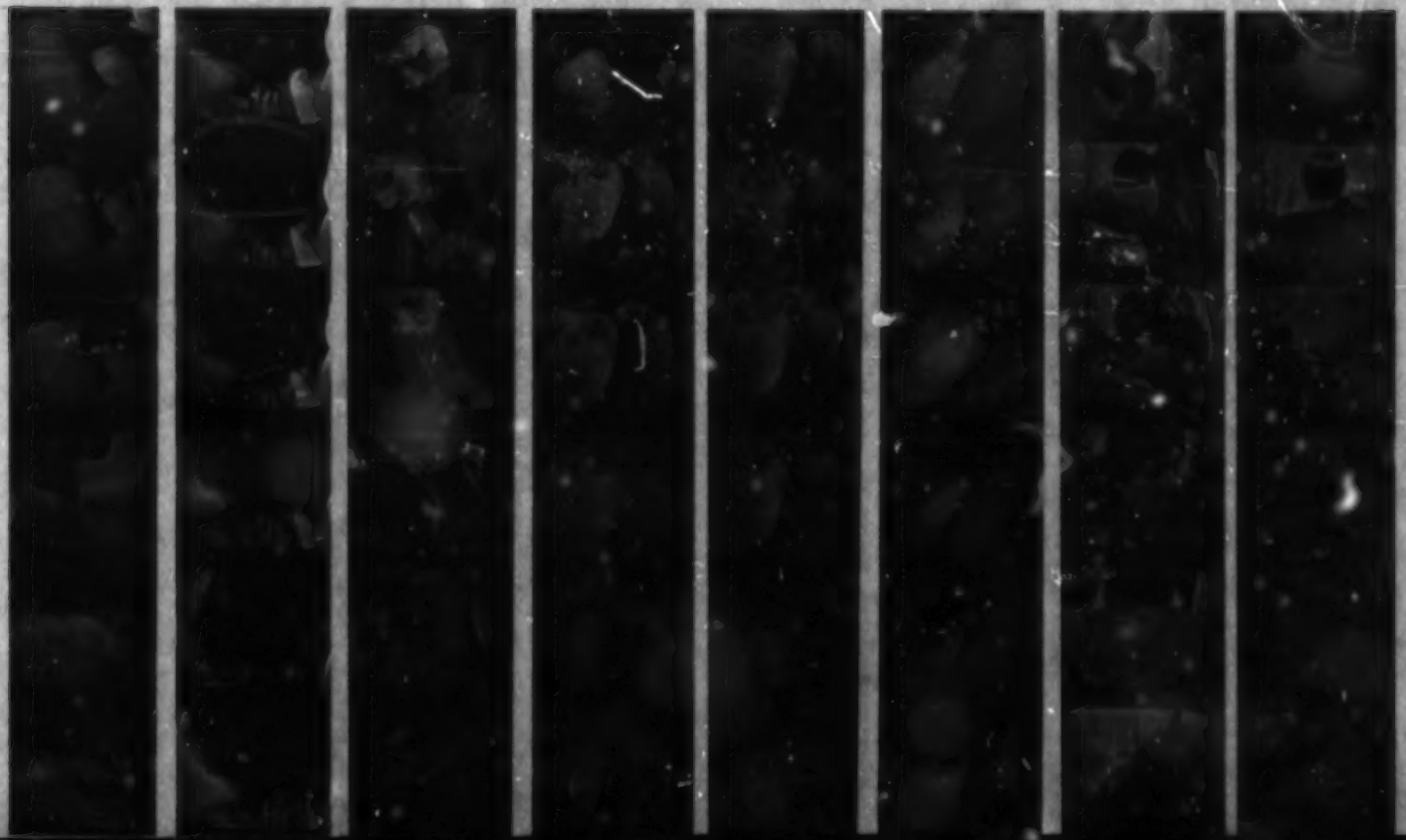
"C.B. MAMAS"
PART 5 OF 10 PARTS
(22:26-23:19) SEXUAL INTERCOURSE. (23:22-24:56) FELLATIO. (24:59-27:57) MALE KISSES, MASSAGES BREASTS, THEN LICKS ANUS OF FEMALE, AS FEMALE MASTURBATES.

"C.B. MAMAS": CERTIFICATE OF REGISTEATION OF A CLAIM TO COPYRIGHT (REG. NO. L.P. 46991) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO MOOKS, INC. (DATE OF ISSUANCE: NOV. 11, 1976).



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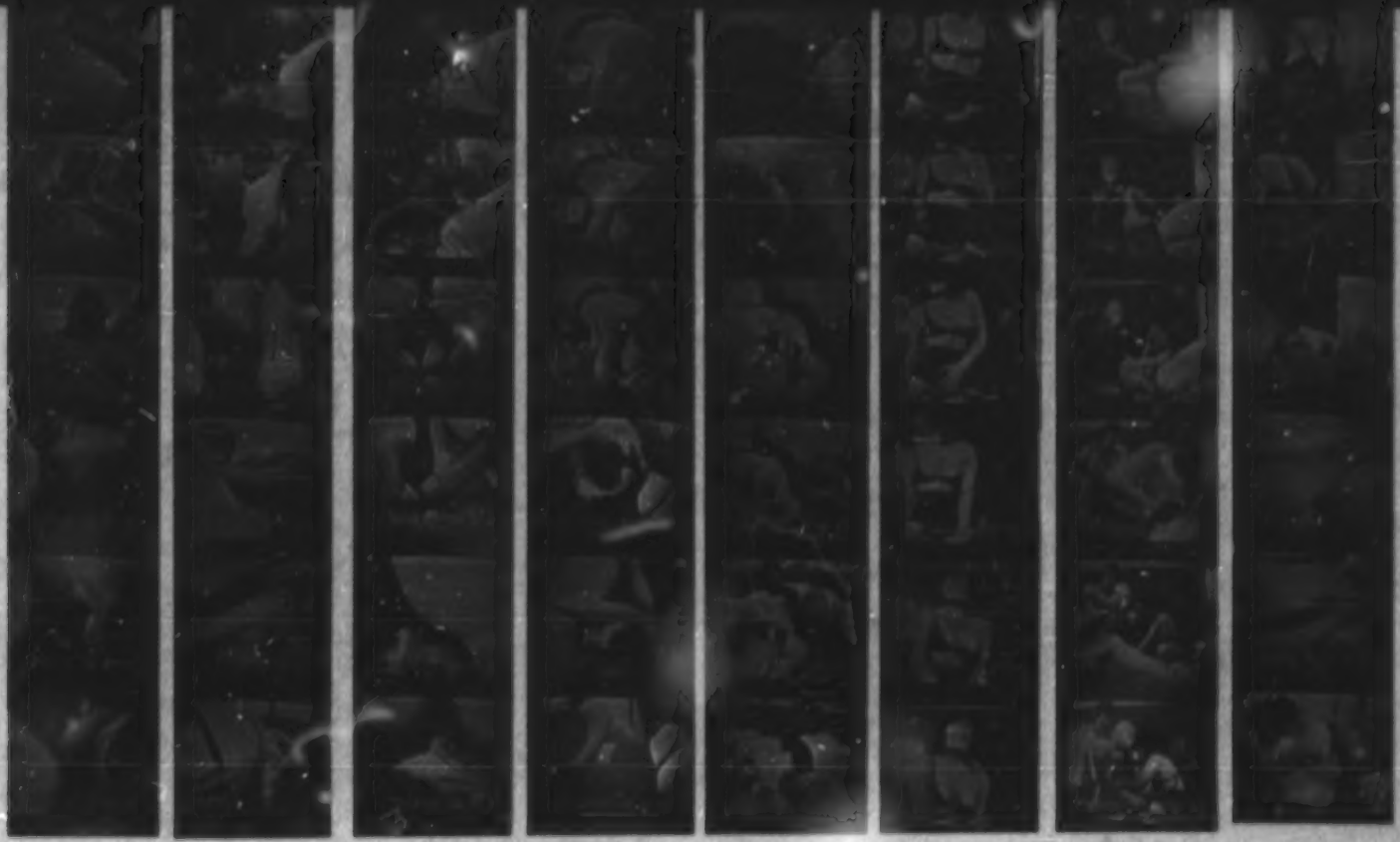
"C.B. MAMAS"
PART 6 OF 10 PARTS
(28:01-29:07) MALE LICKS ANUS OF FEMALE AS SHE MASTURBATES. (29:11-29:35) FELLATIO. (29:39-30:07) SEXUAL INTERCOURSE MALE SUPERIOR. (30:10-30:59) FEMALE EXPOSES HER VAGINA AND PLACES HER FINGER IN HER ANUS. (31:02-31:58) SEXUAL INTERCOURSE FROM THE REAR. (32:02-33:33) TWO FEMALES ENGAGE IN LESBIAN ACTIVITY.

"C.B. MAMAS": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. L.P. 46891) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO HOOKS, INC. (DATE OF ISSUANCE: NOV. 11. 1976).



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"C.B. MAMAS"
PART 7 OF 10 PARTS
(33:36-33:54) TWO FEMALES ENGAGE IN LESBIAN ACTIVITY. LESBIAN KISSING. (33:57-34:46) CUNNILINGUS. (34:49-36:10) DOUBLE CUNNILINGUS. (36:13-38:08) CUNNILINGUS. (38:12-39:08) MALE INTERRUPTS LESBIAN ACTIVITY AND ENGAGES FEMALE IN SEXUAL INTERCOURSE.

"C.B. MAMAS": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. L.P. 46891) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO MOOKS, INC. (DATE OF ISSUANCE: NOV. 11, 1976).

"C.B. MAMAS"
PART 8 OF 10 PARTS
(39:11-40:42) MALE ENGAGES FEMALE IN SEXUAL INTERCOURSE WITH MALE SUPERIOR. (40:46-40:49) FEMALE ENGAGES IN SEXUAL INTERCOURSE WITH FEMALE SUPERIOR. (40:53-41:34) FELLATIO. (41:38-42:20) SEXUAL INTERCOURSE FROM THE REAR. (42:23-44:15) LESLIE'S DAUGHTER LIES ON HER [illegible] AND BEGINS TO MASTURBATE, SHE SAYS "MOM, SHIT. HER AND HER PARTY. WHAT ABOUT ME. I WANT SOME PARTY TOO." (44:20-44:43) A MALE ENTERS AND SAYS "EXCUSE ME, HEY YOU KNOW WHERE I CAN GET SOME MILK FOR MY COFFEE?" FEMALE MANIPULATES HER BREAST AND SQUIRTS MILK INTO A CUP.

"C.B. MAMAS": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. L.P. 46891) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO MOOKS, INC. (DATE OF ISSUANCE: NOV. 11, 1976).

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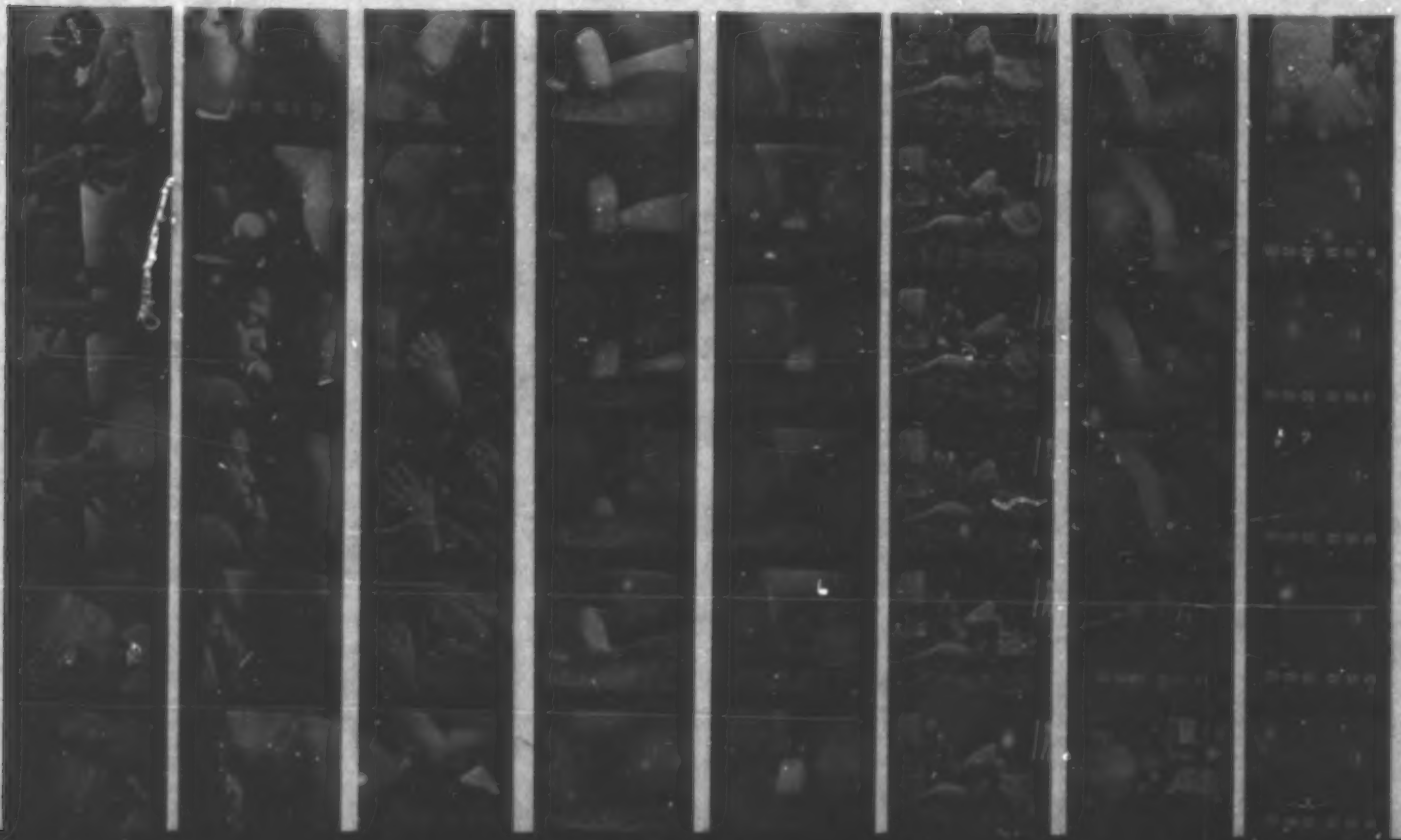
"C.B. MAMAS"
PART 9 OF 10 PARTS
(44:46-46:17) FEMALE (LESLIE'S DAUGHTER) CONTINUES TO MANIPULATE HER BREASTS AND SQUIRT MILK AT MALE'S FACE. (46:21-47:27) SHE PERFORMS FELLATIO ON MALE. (47:30-48:40) MALE PERFORMS SEXUAL INTERCOURSE FROM THE REAR. (48:44-49:54) FEMALE NEGRO MASSAGES HER BREASTS AND VAGINAL AREA. (49:57-50:18) NUDE MALE KISSES FEMALE AND MASSAGES HER BREAST.

"C.B. MAMAS": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. L.P. 46891) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO MOOKS, INC. (DATE OF ISSUANCE: NOV. 11, 1976).



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"C.B. MAMAS"
PART 10 OF 10 PARTS
(50:21-50:58) KISSING CONTINUES. (51:00-51:49) FELLATIO. (51:52-54:36) SEXUAL INTERCOURSE WITH FEMALE SUPERIOR. (54:40-54:43) EJACULATION ON FEMALE'S STOMACH. PARTY IS OVER. (54:47-55:01) RETURN TO FEMALE IN HOUSECOAT AND CURLERS. (55:04-55:49) LESLIE IN HOUSECOAT AND HAIR CURLERS OPENS THE DOORS FOR HER HUSBAND; SHE BERATES HIM "YOU GOT A BOOZE SMELL ON YOU AGAIN" ETC., ETC. FEATURE ENDS.

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APPENDIX D

TIME-MOTION STUDY* OF THE FILM

"INSIDE MARILYN CHAMBERS"

The motion picture film "Inside Marilyn Chambers" was issued a "Certificate of Registration of a Claim to Copyright" by the Copyright Office on Nov. 18, 1976.

* A time-motion study is a chronological series of still photographs of a motion picture film, timed in their relative order of appearance, which, by "stopping" the movement appearing on the motion picture screen and recording the same, permits the type of conduct being portrayed thereon to be analyzed in a fair and accurate manner. Photographs have been taken every 3.6 seconds playing time.

"INSIDE MARILYN CHAMBERS": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. M.P. 30483) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO CINEMA 7, INC. (DATE OF ISSUANCE: NOV. 18, 1976).

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"INSIDE MARILYN CHAMBERS"
PART 1 OF 14 PARTS
(00:03-04:42) DEPICT THE TITLE "INSIDE MARILYN CHAMBERS" PLUS VARIOUS SHOTS OF HER WALKING AND TALKING.
(04:45-05:14) DEPICT SEXUAL INTERCOURSE.

"INSIDE MARILYN CHAMBERS": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. M.P. 30483) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO CINEMA 7, INC. (DATE OF ISSUANCE: NOV. 18. 1976).

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"INSIDE MARILYN CHAMBERS"
PART 2 OF 14 PARTS
(05:37-09:13) TWO FEMALES ARE ENGAGED IN FONDLING AND MASTURBATION. ALSO, SOME SEXUAL INTERCOURSE SCENES WITH MARILYN CHAMBERS. (09:17-10:09) CONTINUE TO DEPICT SEXUAL ACTIVITY. (10:12-10:40) MALE NEGRO STAR JOHNNY KEYES IS INTERVIEWED AND RECALLS HIS MEETING WITH MARILYN CHAMBERS. (10:44-11:08) FEMALES PREPARE FOR FELLATIO.

"INSIDE MARILYN CHAMBERS": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. M.P. 30483) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO CINEMA 7, INC. (DATE OF ISSUANCE: NOV. 18, 1976).

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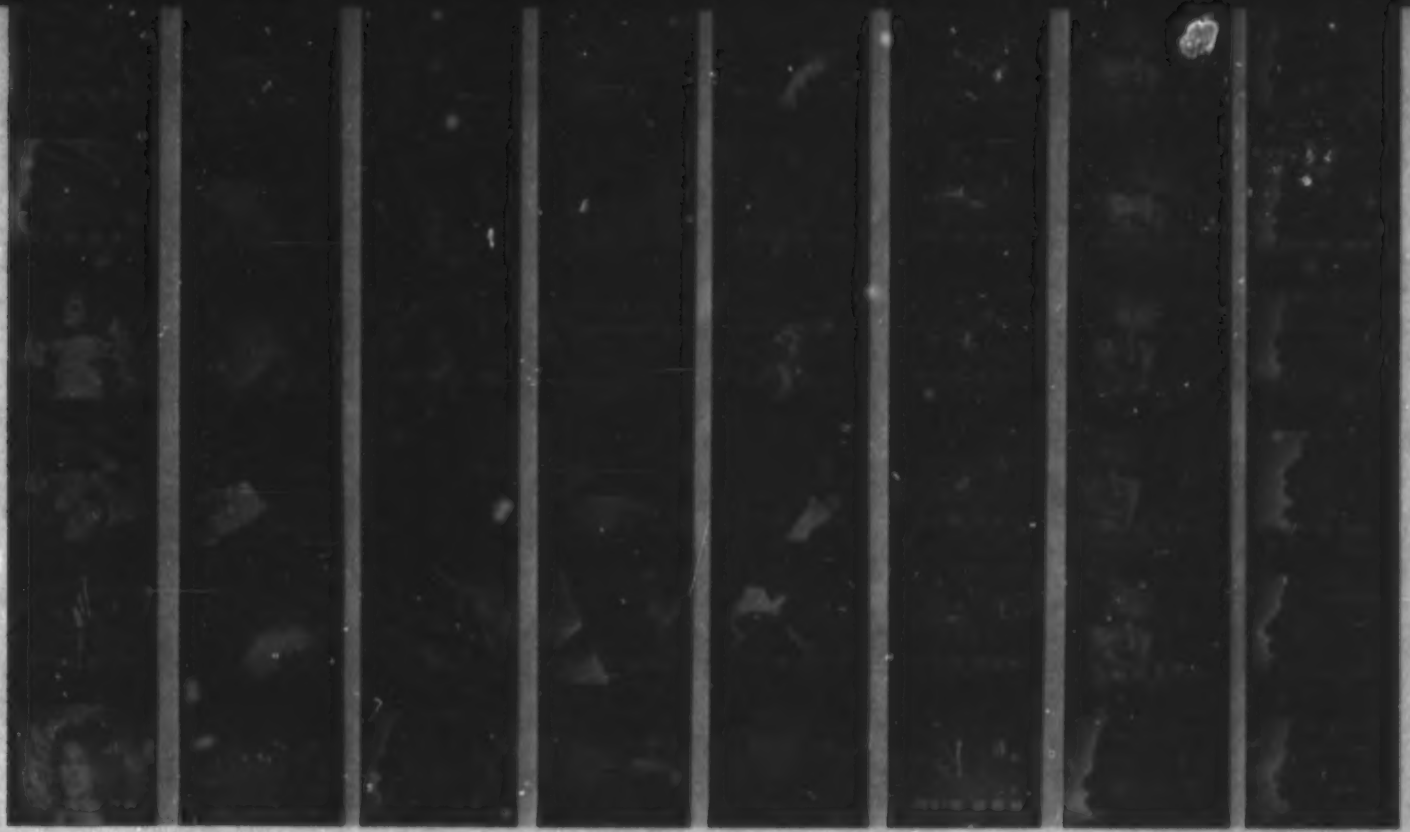
"INSIDE MARILYN CHAMBERS"
PART 3 OF 14 PARTS
(11:12-15:02) CONTAINS SCENES THAT WERE NOT SHOWN IN "BEHIND THE GREEN DOOR" SHOWING TWO FEMALES FELLATING JOHNNY KEYES. HE RECALLS THOSE SCENES AND RELATES HOW HE AND MARILYN MET. SCENES OF KEYES AND CHAMBERS ENGAGED IN CUNNILINGUS AND SEXUAL INTERCOURSE. (15:05-16:43) FACES OF KEYES AND MARILYN CHAMBERS AS INTERVIEWS CONTINUE.

"INSIDE MARILYN CHAMBERS": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. M.P. 30483) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO CINEMA 7, INC. (DATE OF ISSUANCE: NOV. 18, 1976)



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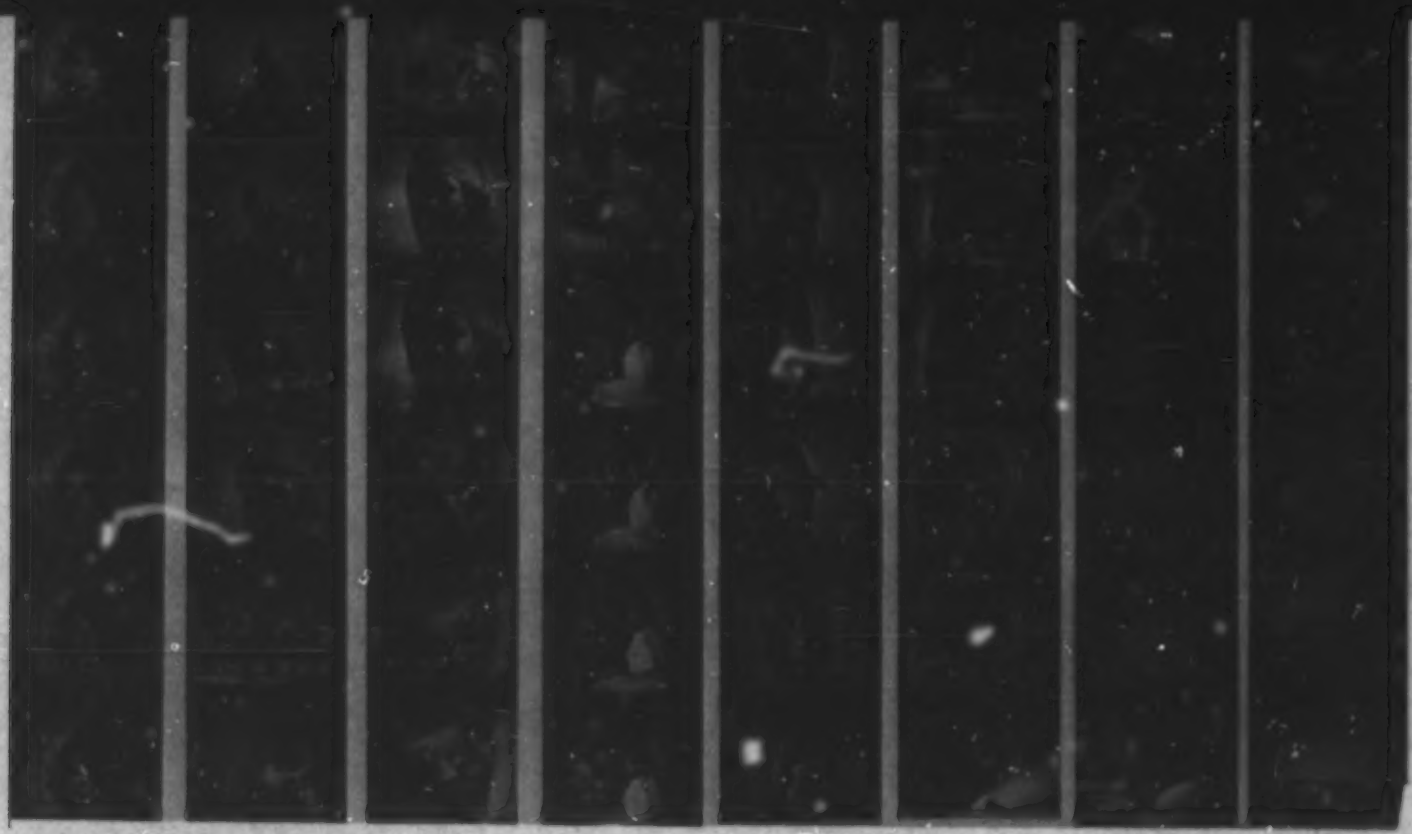
"INSIDE MARILYN CHAMBERS"
PART 4 OF 14 PARTS
(16:46-18:41) INTERVIEWS CONTINUE. SCENES FROM "BEHIND THE GREEN DOOR." (18:45-21:04) DEPICT KEYES ENGAGING IN SEXUAL INTERCOURSE. (21:07-22:17) ANOTHER MALE IS INTERVIEWED. ALSO JOHNNY KEYES AND MARILYN CHAMBERS ARE INTERVIEWED.

"INSIDE MARILYN CHAMBERS": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. M.P. 30483) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO CINEMA 7, INC. (DATE OF ISSUANCE: NOV. 18, 1976).



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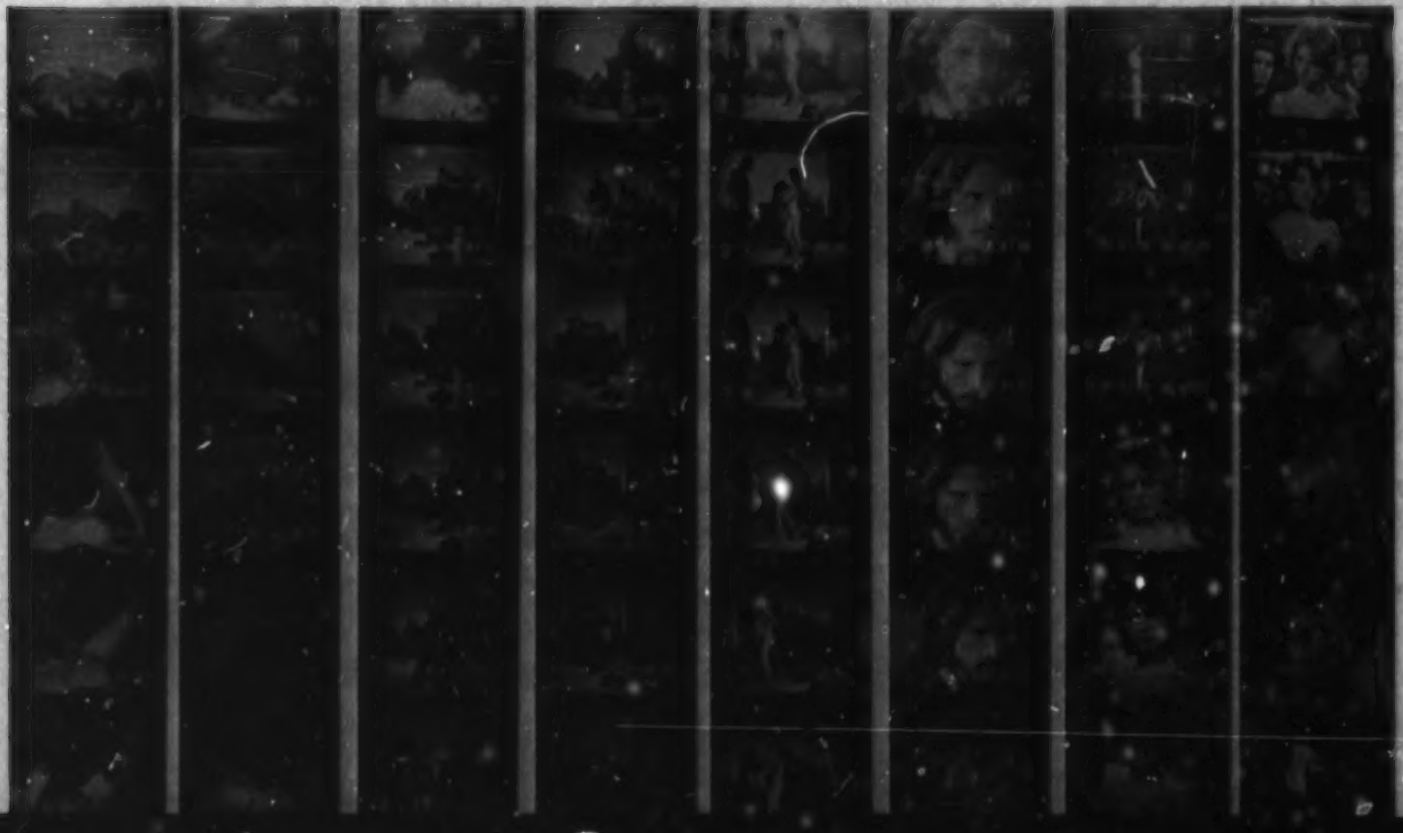
"INSIDE MARILYN CHAMBERS"
PART 5 OF 14 PARTS
(22:21-23:13) KEYES AND MARILYN CHAMBERS CONTINUE TALKING. (23:16-26:42) SHOW KEYES, CHAMBERS AND ANOTHER FEMALE IN BED. CHAMBERS LEAVES THE BED AND THE OTHER FEMALE ENGAGES KEYES IN FELLATIO. MARILYN CHAMBERS FELLATES JOHNNY KEYES. (26:45-27:52) SEXUAL INTERCOURSE.

"INSIDE MARILYN CHAMBERS": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. ...?. 30483) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO CINEMA 7, INC. (DATE OF ISSUANCE: NOV. 18, 1976).



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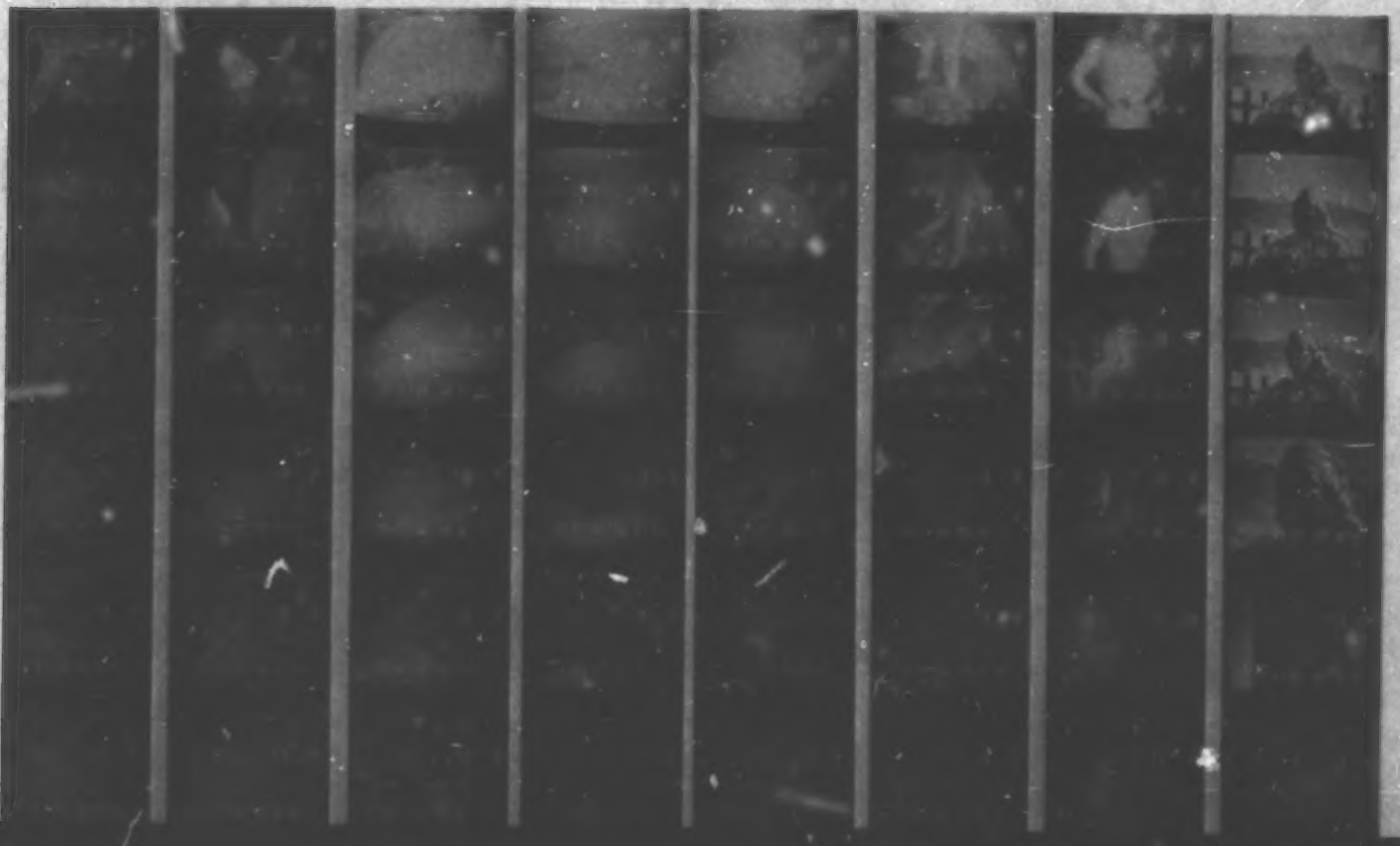
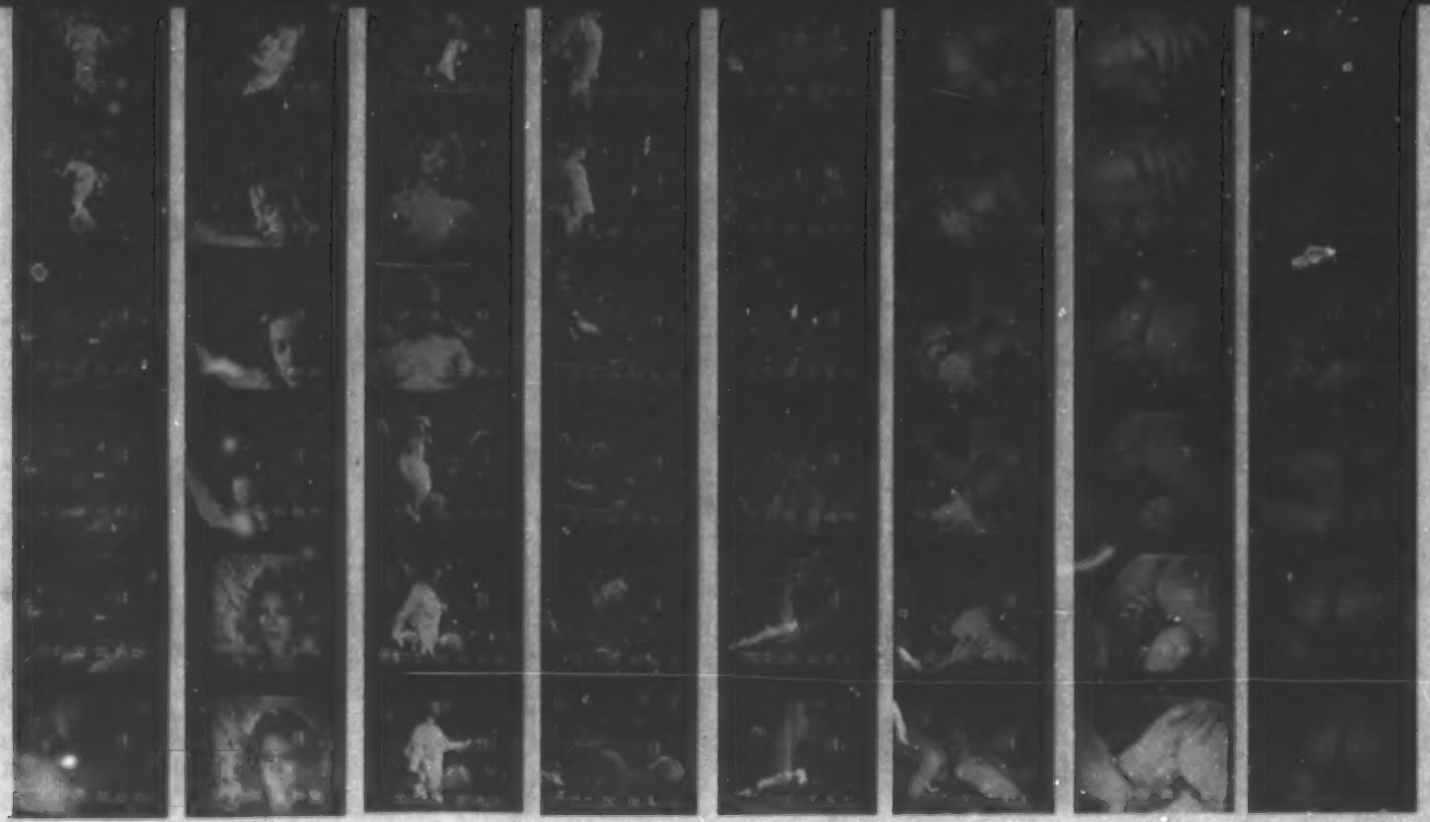
"INSIDE MARILYN CHAMBERS"
PART 6 OF 14 PARTS
(27:55-29:19) SEXUAL INTERCOURSE. (29:22-30:04) DEPICT ARTIE MITCHELL DIRECTING PORNOGRAPHIC SCENES. (30:07-31:14) SCENES NOT SHOWN IN "RESURRECTION OF EVE" DEPICTING NUDE ACTORS. (31:17-32:02) ANOTHER MALE ACTOR SHOWN AND MARILYN CHAMBERS CONTINUES INTERVIEW. (32:06-33:26) SCENES FROM "BEHIND THE GREEN DOOR."

"INSIDE MARILYN CHAMBERS": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. M.P. 30483) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO CINEMA 7, INC. (DATE OF ISSUANCE: NOV. 18, 1976).





"INSIDE MARILYN CHAMBERS"
PART 7 OF 14 PARTS
(33:29-34:43) SCENE FROM "BEHIND THE GREEN DOOR" CONTINUES. (34:46-39:00) INTERVIEW OF MARILYN CHAMBERS AND SCENES OF HER ENGAGED IN SEXUAL INTERCOURSE, CUNNILINGUS, AND SIMULTANEOUS SEXUAL INTERCOURSE AND SODOMY.

"INSIDE MARILYN CHAMBERS": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. M.P. 30483) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO CINEMA 7, INC. (DATE OF ISSUANCE: NOV. 18 1976).

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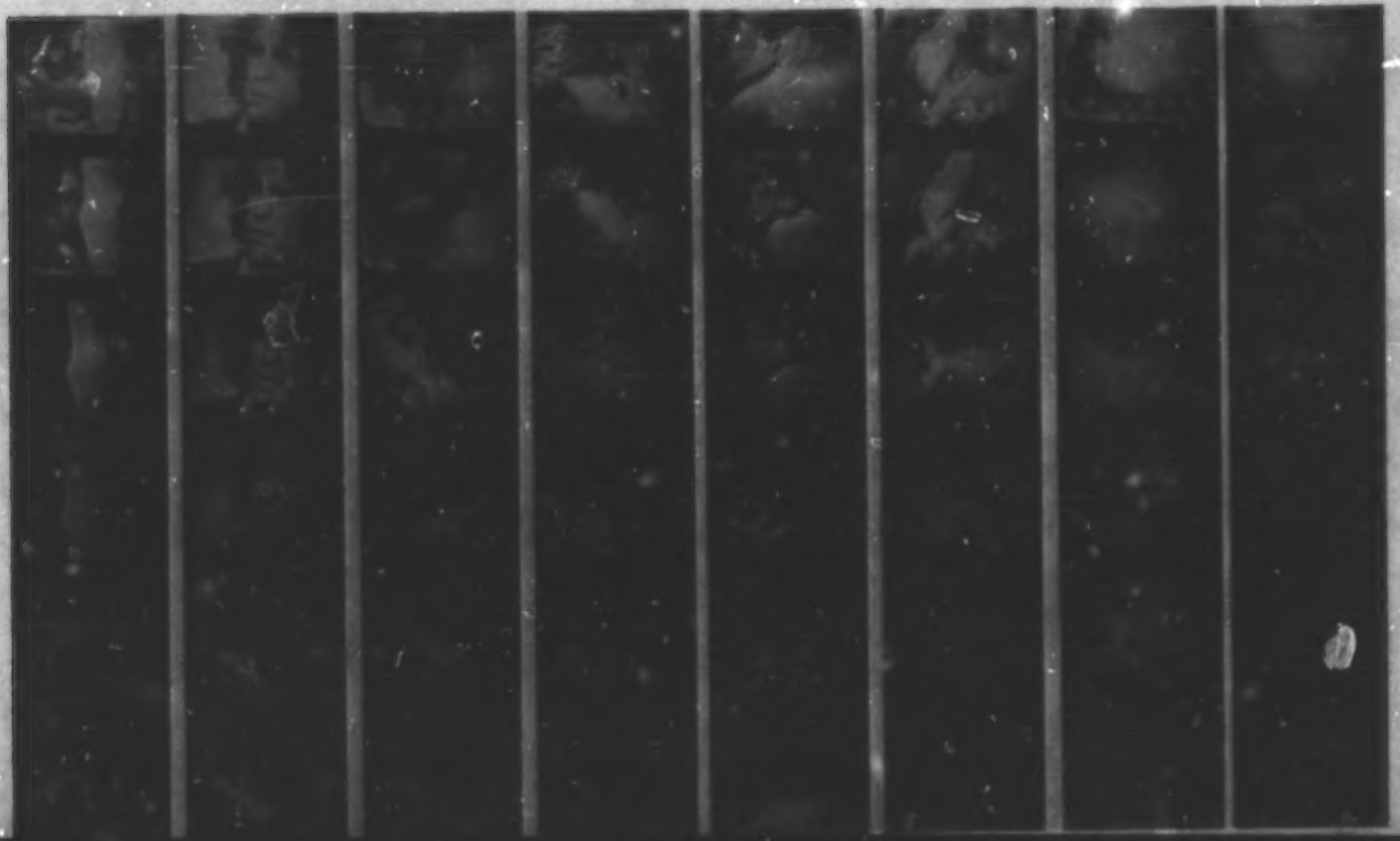
"INSIDE MARILYN CHAMBERS"
PART 8 OF 14 PARTS
(39:04-41:13) SEXUAL INTERCOURSE AND FELLATIO. (41:16-44:35) SHOW VARIOUS NUDE SCENES, CUNNILINGUS BETWEEN TWO FEMALES, PLUS SEXUAL INTERCOURSE BETWEEN A MALE AND FEMALE FROM THE REAR.

"INSIDE MARILYN CHAMBERS": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. M.P. 30483) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO CINEMA 7, INC. (DATE OF ISSUANCE: NOV. 18, 1976).

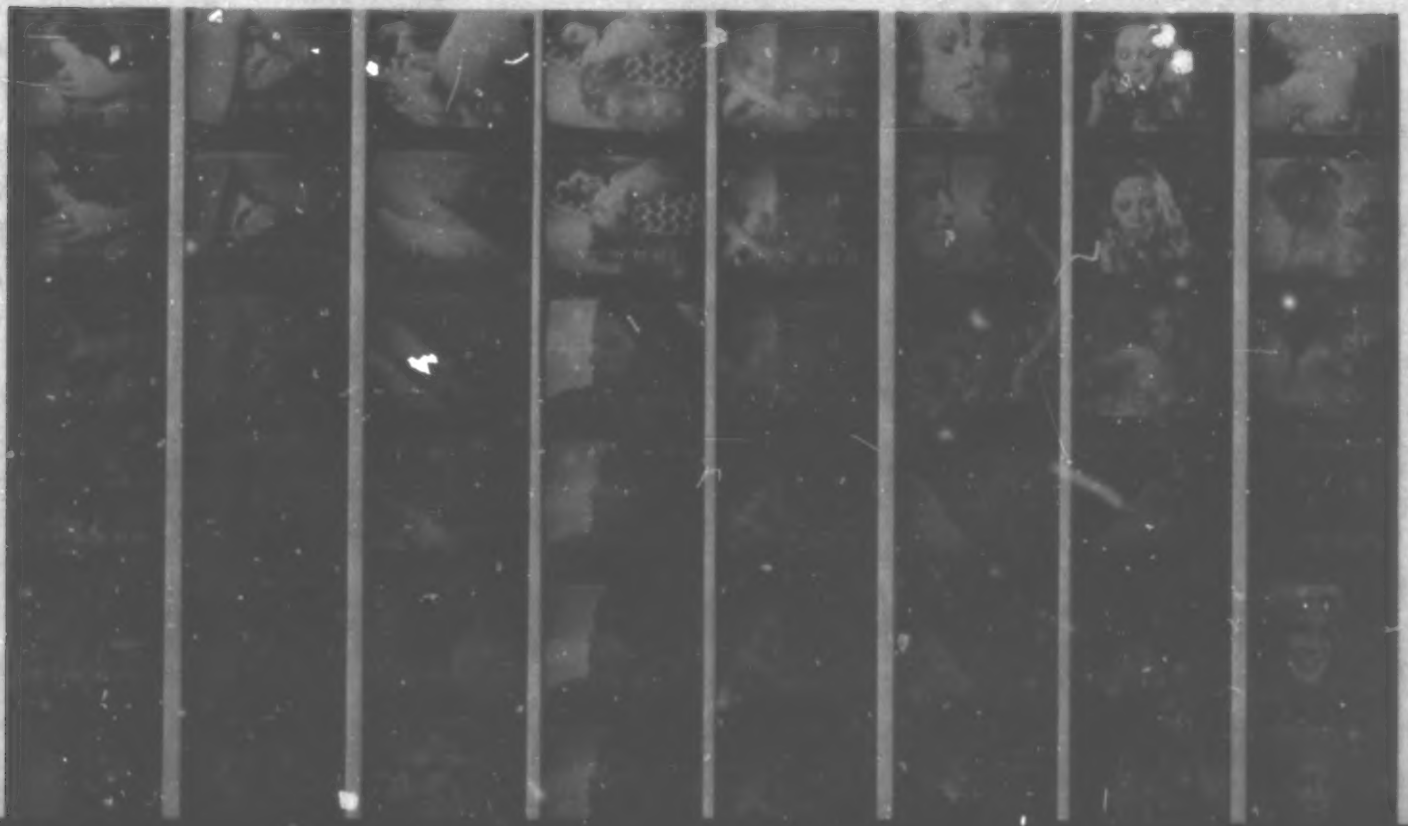


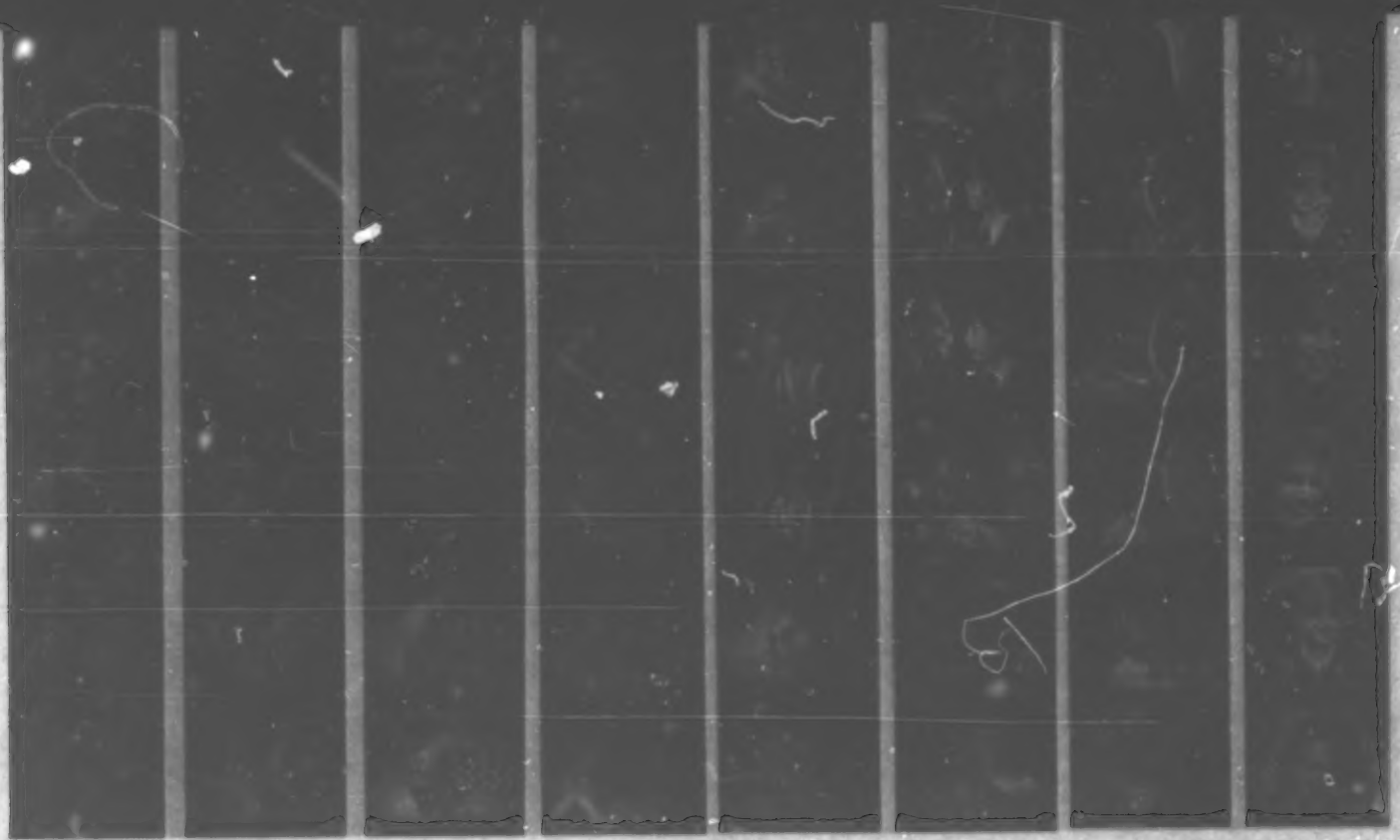
D-174

D-175

"INSIDE MARILYN CHAMBERS"
PART 9 OF 14 PARTS
(44:38-44:49) MARILYN CHAMBERS AND A MALE ENGAGED IN FELLATIO AND CUNNILINGUS. (44:52-45:30) MALE ACTOR IS INTERVIEWED. (45:34-50:09) MALE ACTOR AND CHAMBERS ENGAGE IN SEXUAL INTERCOURSE, BREAST LICKING AND FELLATIO.

"INSIDE MARILYN CHAMBERS": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. M.P. 30483) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO CINEMA 7, INC. (DATE OF ISSUANCE: NOV. 18, 1976).

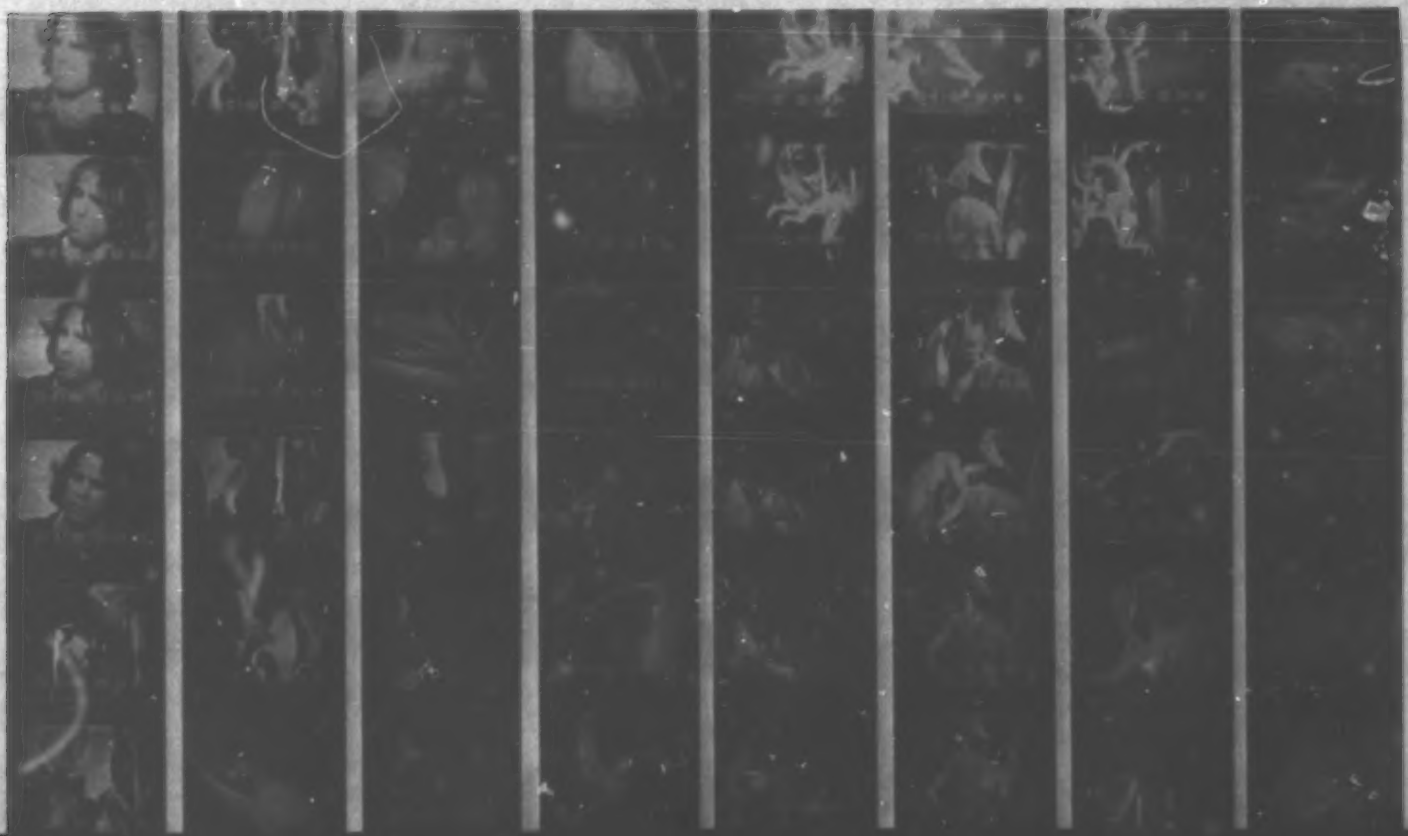


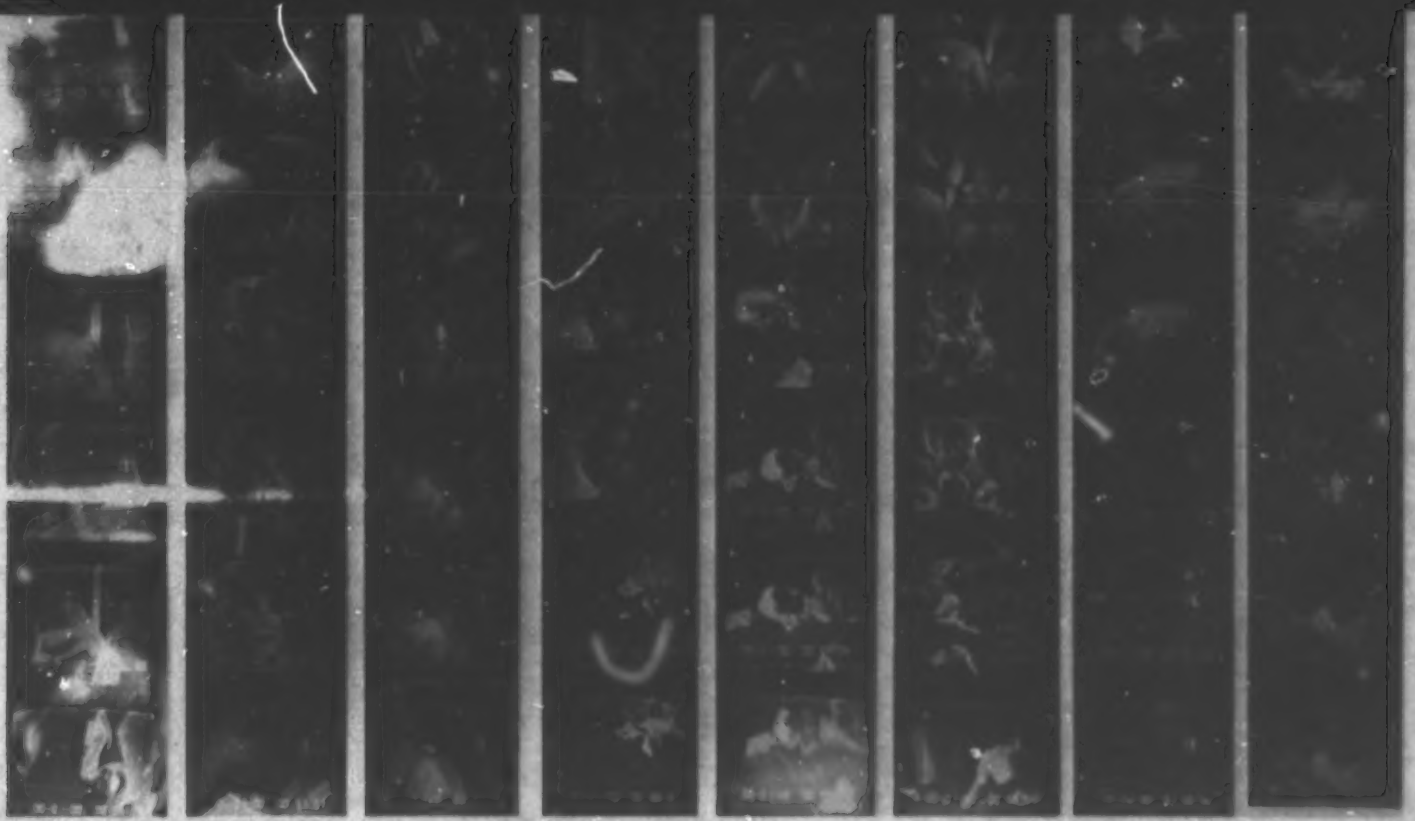


D-177

"INSIDE MARILYN CHAMBERS"
PART 10 OF 14 PARTS
(50:12-52:21) MARILYN CHAMBERS CONTINUES FELLATIO, CUNNILINGUS, AND SEXUAL INTERCOURSE SCENES. (52:25-52:35) MALE ACTOR STILL BEING INTERVIEWED. (52:39-54:27) SEXUAL SCENES CONTINUE WITH MARILYN CHAMBERS INTERVIEWED AND TALKING ON THE PHONE. (54:30-55:43) MARILYN SHOWN NUDE LOOKING IN A MIRROR AND LAUGHING.

"INSIDE MARILYN CHAMBERS": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. M.P. 30483) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO CINEMA 7, INC. (DATE OF ISSUANCE: NOV. 18, 1976).

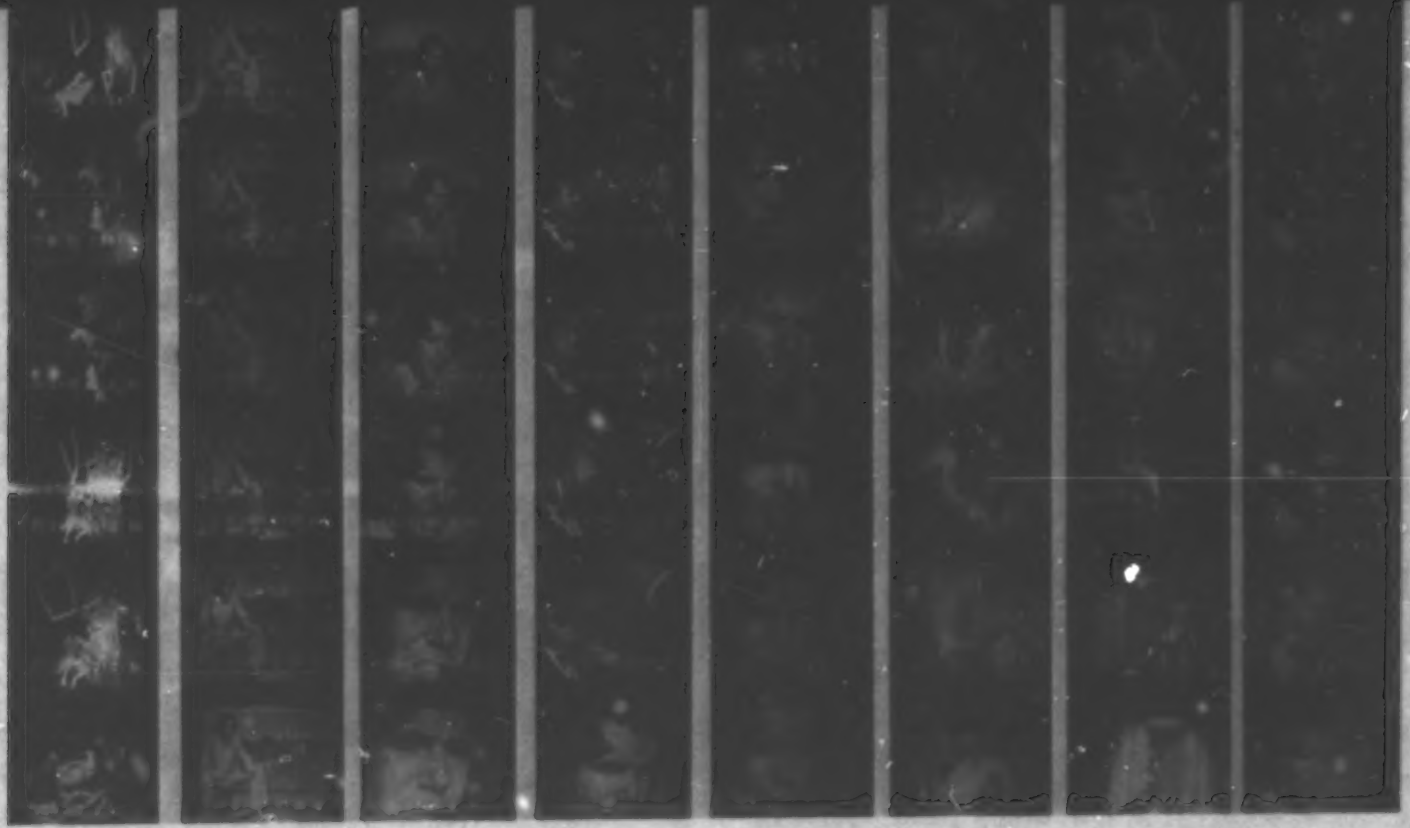




D-179

"INSIDE MARILYN CHAMBERS"
PART 11 OF 14 PARTS
(55:47-57:04) THE MALE ACTOR TALKS AS MARILYN CHAMBERS' INTERVIEW CONTINUES. (57:07-B01:18) VARIOUS SCENES OF MARILYN CHAMBERS ENGAGING OTHERS IN SEXUAL ACTIVITY.

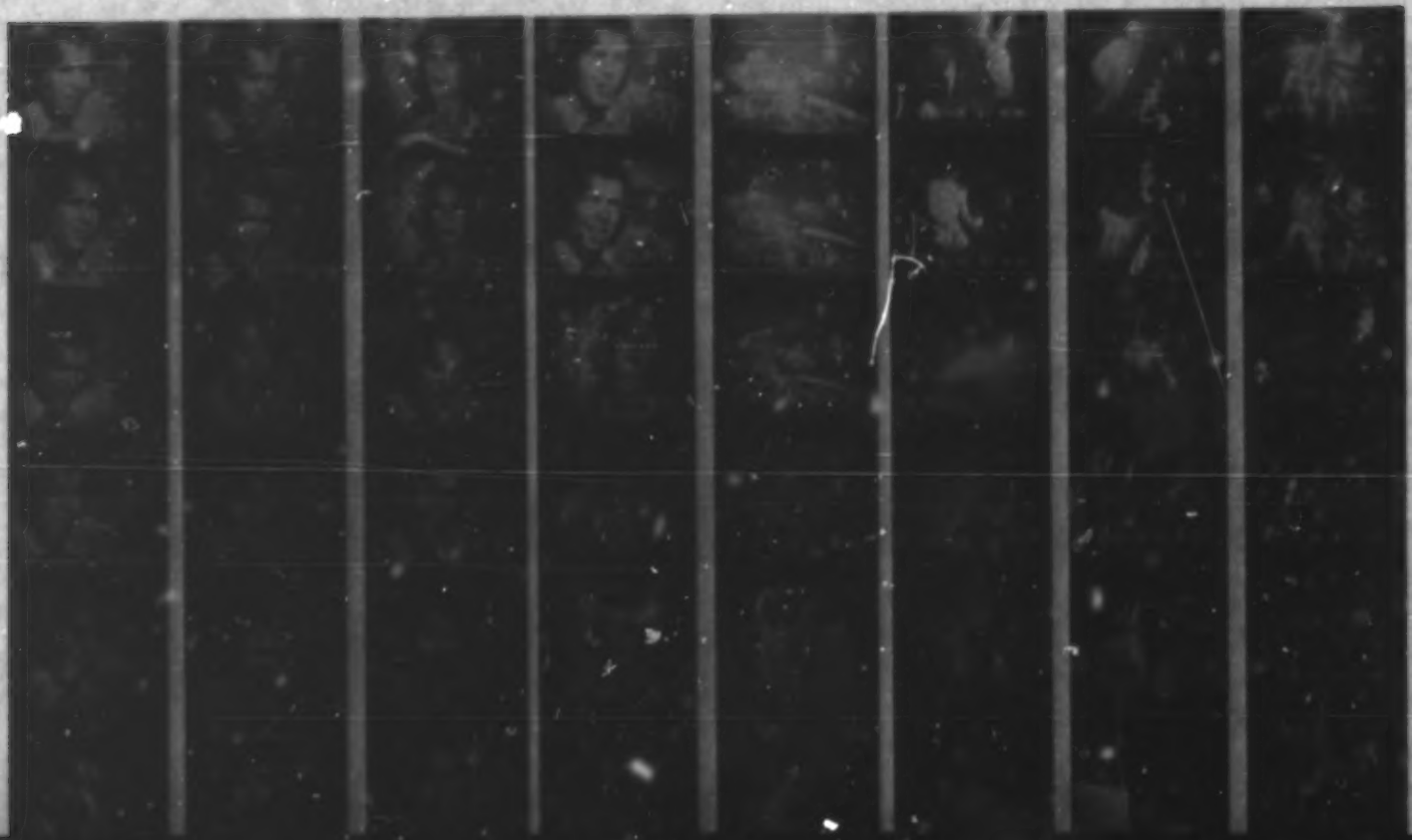
"INSIDE MARILYN CHAMBERS": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. M.P. 30483) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO CINEMA 7, INC. (DATE OF ISSUANCE: NOV. 18 1976).

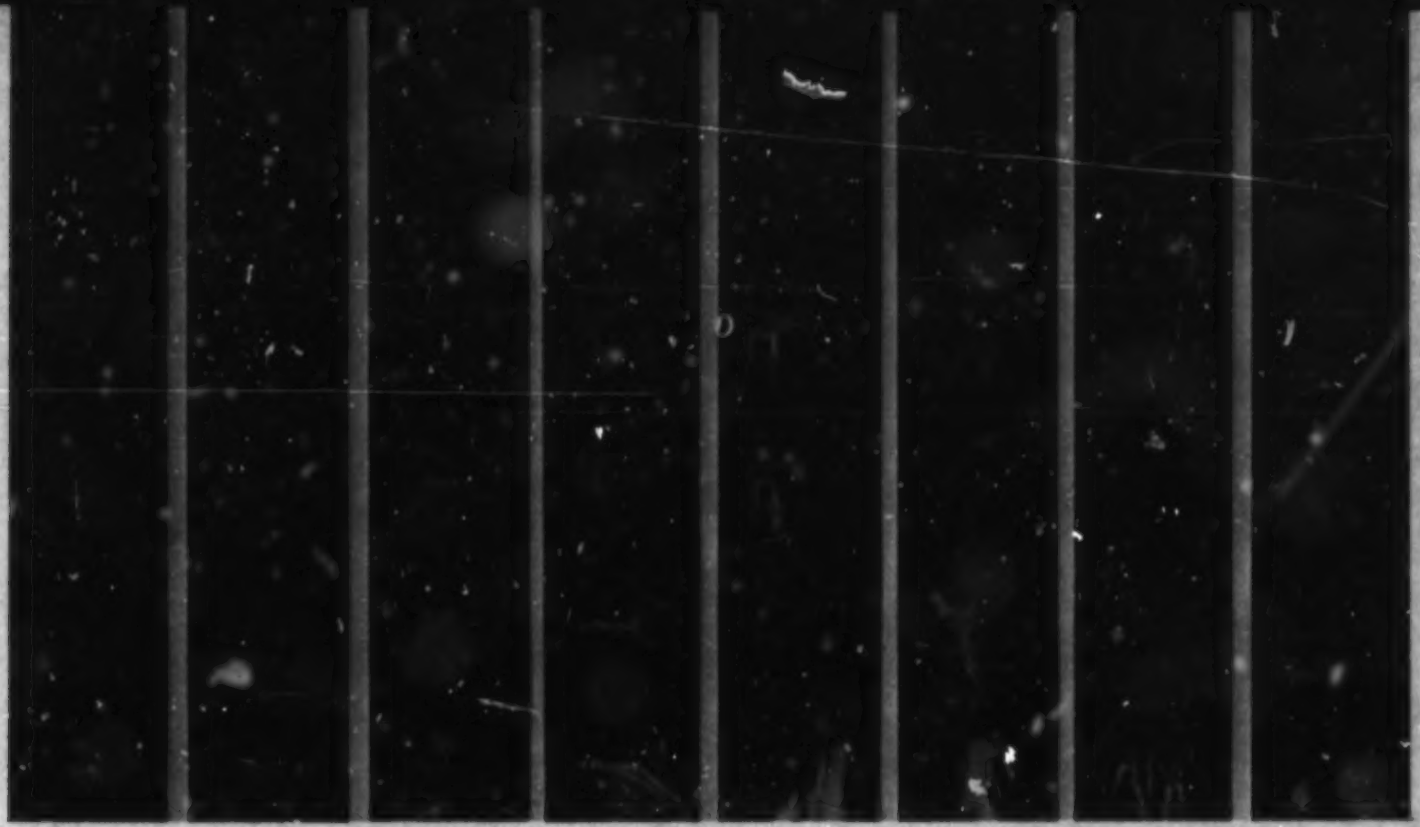


D-161

"INSIDE MARILYN CHAMBERS"
PART 12 OF 14 PARTS
(B01:21-B02:03) FELLATIO SHOWN AS INTERVIEWS CONTINUE OF ACTORS INVOLVED WITH CHAMBERS IN "BEHIND THE GREEN DOOR." (B02:47-B06:52) MALE ACTOR CONTINUES TO DISCUSS SCENES OF "BEHIND THE GREEN DOOR."

"INSIDE MARILYN CHAMBERS": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. M.P. 30483) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO CINEMA 7, INC. (DATE OF ISSUANCE: NOV. 18, 1976).

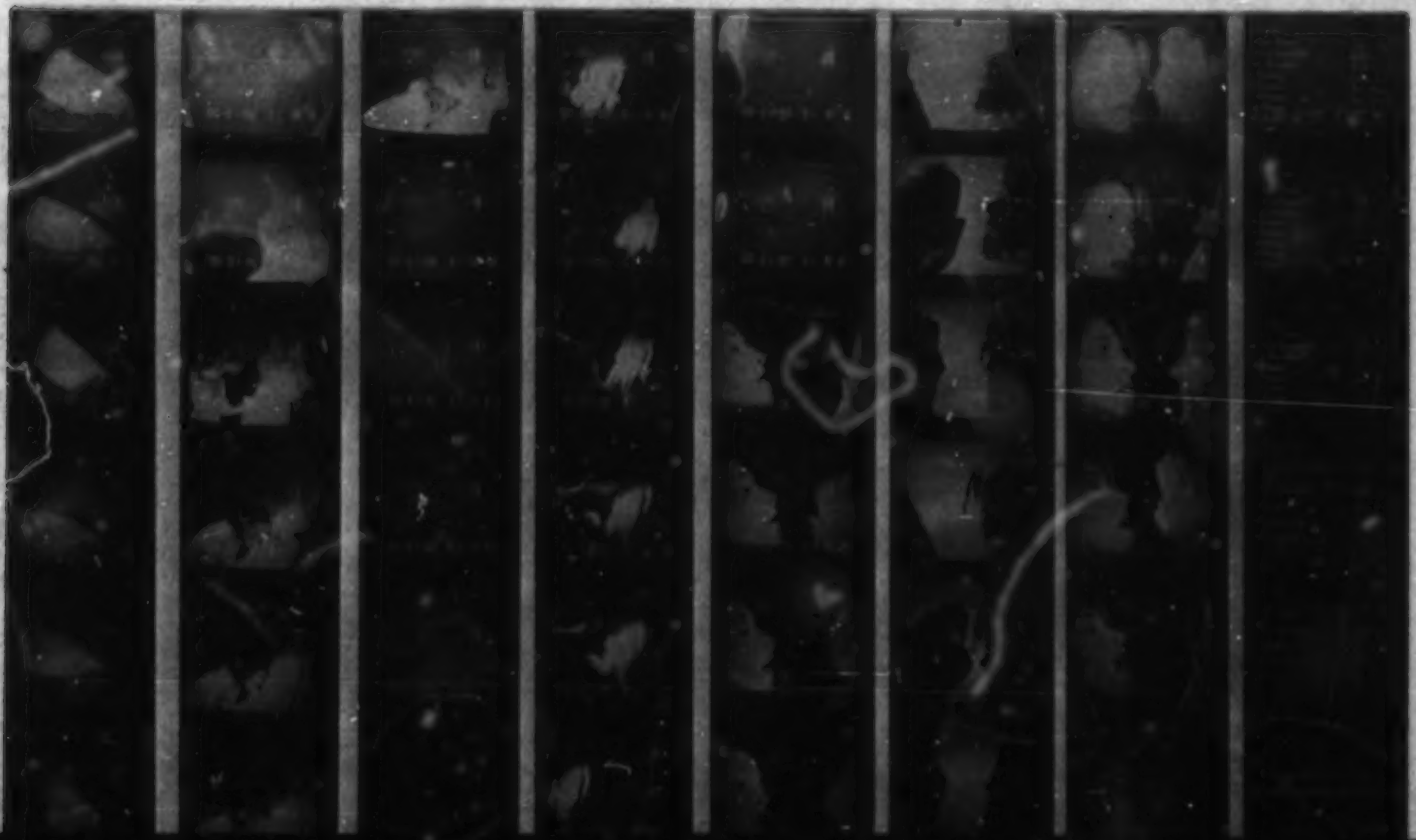




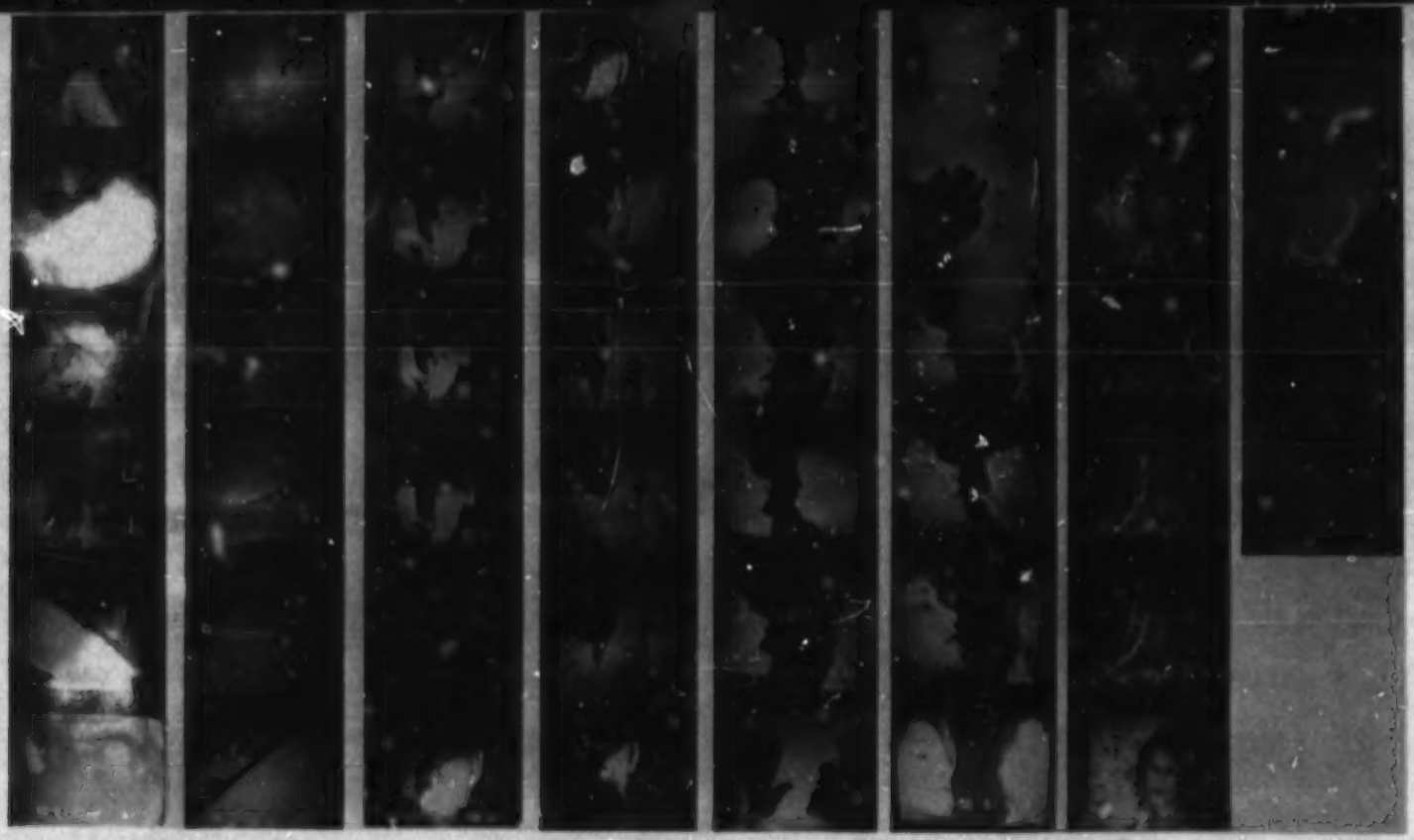
D-183

"INSIDE MARILYN CHAMBERS"
PART 13 OF 14 PARTS
(06:56-12:27) DEPICT MARILYN CHAMBERS AND MALE ACTOR BEING INTERVIEWED SEPARATELY. NUDE SCENES FROM "BEHIND THE GREEN DOOR" ARE SHOWN.

"INSIDE MARILYN CHAMBERS": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. M.P. 30483) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO CINEMA 7, INC. (DATE OF ISSUANCE: NOV. 18,



I-184



D-185

"INSIDE MARILYN CHAMBERS"
PART 14 OF 14 PARTS
(1:12:30-1:17:55) CONTINUED SCENES FROM "BEHIND THE GREEN DOOR." - THE TRAPEZE SCENES WITH FELLATIO AND CUNNILINGUS. EJACTULATION. CLOSING SCENE OF MARILYN CHAMBERS TALKING, THEN SHOWN NUDE AS CREDITS ARE SHOWN AS FILM ENDS.

APPENDIX E

(Reference: Petition at pg. 3.)

Orders of California Supreme Court and Courts of Appeal.

.....E-1 thru E-4

SUPREME COURT

FILED

MAY 17, 1982

LAURENCE P. GILL, Clerk

_____ Deputy

4 CIVIL NO. 19940

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

PEOPLE, EX REL., COOPER, ETC.

V.

MITCHELL BROTHERS SANTA ANA THEATER ET AL.

The time for granting or denying a hearing in the above cause is hereby extended to and including JUNE 18, 1982 or the date upon which a hearing is either granted or denied.

/s/Bird

Chief Justice

SUPREME COURT
FILED
MAY 27, 1982
LAURENCE P. GILL, Clerk

_____ Deputy

ORDER DENYING HEARING

AFTER JUDGMENT BY THE COURT OF APPEAL

4th District, Division 2, Civil No. 19940

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

IN BANK

PEOPLE ex rel. Cooper, etc.,

v.

MITCHELL BROTHERS SANTA ANA THEATER et al.,

Petition of PEOPLE ex rel. COOPER, etc. for hearing DENIED.

Reynoso, J., is of the opinion that the petition should be granted.

/s/ BIRD
Chief Justice

IN THE

Court of Appeal, Fourth Appellate District

State of California

DIVISION TWO

4 CIVIL No. 19940

REMITTITUR

PEOPLE ET AL., Plaintiffs and Appellants,	)	Superior Court No. 256530
v.	)	
MITCHELL BROTHERS SANTA ANA THEATER ET AL., Defendants and Appellants.	)	County of Orange

I, RICHARD J. SMITH, Acting Clerk of the Court of Appeal, Fourth Appellate District, State of California, certify the attached is a true and correct copy of the original opinion or decision entered in the above entitled cause on February 18, 1982 and this opinion or decision has now become final.

Respondence to recover costs on appeal.

APPENDIX F

(Reference: Petition at pg. 3, 57, 60.)

California Statutory Provisions Involved.

.....F-1 thru F-21

APPENDIX "F"

Civil Code § 5. Provisions similar to existing laws, how construed

The provisions of this code, so far as they are substantially the same as existing statutes or the common law, must be construed as continuations thereof, and not as new enactments.

Civil Code § 22.2. [Common law, when rule of decision]

The common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of this State, is the rule of decision in all the courts of this State.

Civil Code § 3366. [Specific relief, etc., when allowed]

Specific or preventive relief may be

given as provided by the laws of this state.

Civil Code § 3367. Specific relief, how given

Specific relief is given:

1. By taking possession of a thing, and delivering it to a claimant;

2. By compelling a party himself to do that which ought to be done; or,

3. By declaring and determining the rights of parties, otherwise than by an award of damages.

Civil Code § 3368. Preventive relief, how given

Preventive relief is given by prohibiting a party from doing that which ought not to be done.

Civil Code § 3369. [Relief not granted to enforce penalty, forfeiture or penal law: Exceptions: Unfair competition enjoinable: Definitions: Who may prosecute actions]

1. Neither specific not preventive relief can be granted to enforce a penalty or forfeiture in any case, nor to enforce a penal law, except in a case of nuisance or unfair competition.

2. . . .

3. . . .

4. As used in this section, the term person shall mean and include natural persons, corporations, firms, partnerships, joint stock companies, associations and other organizations of persons.

5. Actions for injunction under this section may be prosecuted by the Attorney General or any district attorney in this State in the name of the people of the State of California upon their own complaint or upon the complaint of any board, officer, person, corporation, or association or by any person acting for the interests of itself, its members or the general public.

Civil Code § 3479. [Nuisance, what]

Anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway is a nuisance.

Civil Code § 3480. [Public nuisance]

A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal.

Civil Code § 3481. Private nuisance.

Every nuisance not included in the definition of the last section is private.

Civil Code § 3482. What is not deemed a nuisance.

Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance.

Civil Code § 3483. Successive owners.

Every successive owner of property who neglects to abate a continuing nuisance upon, or in the use of, such property, created by the former owner, is liable therefor in the same manner as the one who first created it.

Civil Code § 3484. Abatement does not preclude action

The abatement of a nuisance does not prejudice the right of any person to recover damages for its past existence.

Civil Code § 3490. Lapse of time does not legalize

No lapse of time can legalize a public nuisance, amounting to an actual

obstruction of public right.

Civil Code § 3491. [Remedies against public nuisance]

The remedies against a public nuisance are:

1. Indictment or information;

2. A civil action; or,

3. Abatement.

Civil Code § 3492. [Remedy regulated, how]

The remedy by indictment or information is regulated by the Penal Code.

Civil Code § 3493. Remedies for public nuisance

A private person may maintain an action for a public nuisance, if it is specially injurious to himself, but not otherwise.

Civil Code § 3494. Action

A public nuisance may be abated by any public body or officer authorized thereto by law.

Civil Code § 3495. How abated

Any person may abate a public nuisance which is specially injurious to him by removing, or, if necessary, destroying the thing which constitutes the same, without committing a breach of the peace, or doing unnecessary injury.

Civil Code § 3523. For every wrong there is a remedy.

Gov't Code § 38771. Declaration of nuisance

By ordinance the city legislative body may declare what constitutes a nuisance.

Gov't Code § 38773. Summary abatement of nuisances

The legislative body may provide for the summary abatement of any nuisance at the expense of the persons creating, causing, committing, or maintaining it and by ordinance may make the expense of abatement of nuisances a lien against the property on which it is maintained and a personal obligation against the property

owner.

Gov't Code § 38773.5. Cost of abatement of a nuisance upon land made a special assessment: Levy, collection and enforcement of assessment

The legislative body may by ordinance establish a procedure for the abatement of a nuisance and make the cost of abatement of a nuisance upon a parcel of land a special assessment against that parcel. The assessment may be collected at the same time and in the same manner as ordinary municipal taxes are collected, and shall be subject to the same penalties and the same procedure and sale in case of delinquency as provided for ordinary municipal taxes. All laws applicable to the levy, collection and enforcement of municipal taxes shall be applicable to such special assessment.

Code of Civil Procedure § 731. [(Right to bring action to enjoin or abate nuisance, and to recover damages; Abatement of public nuisance]

An action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by a nuisance, as the same is defined in section thirty-four hundred and seventy-nine of the Civil Code, and by the judgment in such action the nuisance may be enjoined or abated as well as damages recovered therefor. A civil action may be brought in the name of the people of the State of California to abate a public nuisance, as the same is defined in section thirty-four hundred and eighty of the Civil Code, by the district attorney of any county in which such nuisance exists, or by the city attorney of any town or city in which such nuisance exists, and each of said officers

shall have concurrent right to bring such action for a public nuisance existing within a town or city, and such district attorney, or city attorney, of any county or city in which such nuisance exists must bring such action whenever directed by the board of supervisors of such county or whenever directed by the legislative authority of such town or city.

Code of Civil Procedure § 1021. [Compensation of attorneys: Costs and disbursements to parties]

Except as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties; but parties to actions or proceedings are entitled to costs and disbursements, as hereinafter provided.

Code of Civil Prodedure § 1021.5. [Attorney fees in cases resulting in public benefit]

Upon motion, a court may award attorney's fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any. With respect to actions involving public entities, this section applies to allowances against, but not in favor of, public entities, and no claim shall be required to be filed therefor.

Penal Code §311. [Definitions.] As used in this chapter:

(a) "Obscene matter" means matter, taken as a whole, the predominant appeal of which to the average person, applying contemporary standards, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is matter which taken as a whole is utterly without redeeming social importance.

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(1) The predominant appeal to prurient interest of the matter is judged with reference to average adults unless it appears from the nature of the matter or the circumstances of its dissemination, distribution or exhibition, that it is designed for clearly defined deviant sexual groups, in which case the predominant appeal of the matter shall be judged with reference to its intended recipient group.

(2) In prosecutions under this chapter, where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that matter is being commercially exploited by the defendant for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance.

(3) In determining whether the matter

taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters the fact that the defendant knew that the matter depicts persons under the age of 16 years engaged in sexual conduct, as defined in subdivision (c) of Section 311.4, is a factor which can be considered in making such a determination.

(b) "Matter" means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statue or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

(c) "Person" means any individual, partnership, firm, association, corporation, or other legal entity.

(d) "Distribute" means to transfer pos-

session of, whether with or without consideration.

(e) "Knowingly" means being aware of the character of the matter or live conduct.

(f) "Exhibit" means to show.

Penal Code §311.2 [Sale or distribution, etc., of obscene matter.] (a) Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state possesses, prepares, publishes, or prints, with intent to distribute or to exhibit to others, or who offers to distribute, distributes, or exhibits to others, any obscene matter is guilty of a misdemeanor.

(b) Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state possesses, prepares, publishes, or prints, with intent to distribute or to exhibit to others

for commercial consideration, or who offers to distribute, distributes, or exhibits to others for commercial consideration, any obscene matter, knowing that such matter depicts a person under the age of 18 years personally engaging in or personally simulating sexual intercourse, masturbation, sodomy, bestiality, or oral copulation is guilty of a felony and shall be punished by imprisonment in state prison for two, three, or four years, or by a fine not exceeding fifty thousand dollars ($50,000), in the absence of a finding that the defendant would be incapable of paying such a fine, or by both such fine and imprisonment.

(c) The provisions of this section with respect to the exhibition of, or the possession with intent to exhibit, any obscene matter shall not apply to a motion picture operator or projectionist who is employed by a person licensed by any city

or county and who is acting within the scope of his employment, provided that such operator or projectionist has no financial interest in the place wherein he is so employed.

(d) Except as otherwise provided in subdivision (c), the provisions of subdivision (a) or (b) with respect to the exhibition of, or the possession with intent to exhibit, any obscene matter shall not apply to any person who is employed by a person licensed by any city or county and who is acting within the scope of his employment, provided that such employed person has no financial interest in the place wherein he is so employed and has no control, directly or indirectly, over the exhibition of the obscene matter.

Penal Code §370. [Public nuisances defined.] Anything which is injurious to health, or is indecent, or offensive to the senses, or an obstruction to the free

use of property, so as to interfere with the comfortabl. enjoyment of life or property by an entire community or neighborhood, or by any considerable number of persons, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a public nuisance.

Penal Code §371. [Unequal damage.] An act which affects an entire community or neighborhood, or any considerable number of persons, as specified in the last section, is not less a nuisance because the extent of the annoyance or damage inflicted upon individuals is unequal.

Penal Code §372. Maintaining a nuisance, a misdemeanor. Every person who maintains or commits any public nuisance, the punishment for which is not otherwise prescribed, or who willfully omits to perform

any legal duty relating to the removal of a public nuisance, is guilty of a misdemeanor.

Penal Code §373a. [Maintaining or permitting public nuisance after abatement notice: Each day's existence a separate offense: Duty of district attorney.]

Every person who maintains, permits, or allows a public nuisance to exist upon his or her property or premises, and every person occupying or leasing the property or premises of another who maintains, permits or allows a public nuisance to exist thereon, after reasonable notice in writing from a health officer or district attorney or city attorney or prosecuting attorney to remove, discontinue or abate the same has been served upon such person, is guilty of a misdemeanor, and shall be punished accordingly; and the existence of such nuisance for each and every day after the service of such notice shall be deemed

a separate and distinct offense, and it is hereby made the duty of the district attorney, or the city attorney of any city the charter of which imposes the duty upon the city attorney to prosecute state misdemeanors, to prosecute all persons guilty of violating this section by continuous prosecutions until the nuisance is abated and removed.

U.S. CONSTITUTION, AMENDMENT I

Congress shall made no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONSTITUTION, AMENDMENT IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

U.S. CONSTITUTION, AMENDMENT X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. CONSITUTION, AMENDMENT XIV

Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX G

(Reference: Petition at pg. 40-42.)

Newspaper Articles appearing in the New York Times on July 1, 1973 and the San Francisco Chronicle on July 16, 1973.

.....G-1 thru G-4

SMUT MAKERS CALL BUSINESS VIABLE

1964

Say Supreme Court Ruling Won't Force Them Out

Special to The New York Times

SAN FRANCISCO, June 30—In the major pornography producing centers of Los Angeles and San Francisco, the Supreme Court's latest ruling on obscenity was met this week with concern and anger but also with the promise that the business was not dead.

In San Francisco, James Mitchell, who along with his brother Artie has emerged as one of the most successful pornographic-film makers in the nation, called the Court's ruling on June 21 "totally insane."

But while he was critical of the decision, he said that he would not be forced out of business. "They'll have to put us in jail," he said. "We're prepared to go down fighting."

In Los Angeles, Stanley Fleischman, a lawyer who represents a number of major producers of pornography in that area, called the Court's ruling a giant step backward, but made it clear that his clients would not go out of business.

'Does Not Outlaw Sex'

"My clients, which are the major ones, will comply with the law," he said. "They will put out films which have serious literary, artistic, political or scientific value."

Mr. Fleischman said that "the law remains vague" but added that "in my opinion the ruling does not outlaw sex—writing out or pictorial representation of sexual matters." He said that it was true that the Court had "watered down the broad protection that material had to be utterly without redeeming social value."

G-1

In its ruling the Supreme Court handed down a new set of guidelines on obscenity that will enable states to ban books, magazines, plays and motion pictures that are offensive to local standards even if they are acceptable elsewhere.

On the West Coast the immediate reaction was that the ruling would have a greater impact on films than on pornographic literature.

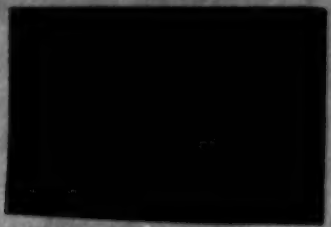
That was explained by pointing out that pornographic literature was on the decline. In San Francisco, Phil Rosenberg, operator of Harold's Bookstore, explained the decline by pointing out that five years ago there were 50 to 60 publishers and that he would receive as many as 125 new pornographic books a week. "But today," he said, "we're lucky to get five new titles a week."

Startling Success

For makers of pornographic films, however, the ruling comes at a time when the business is enjoying startling success.

Variety, the entertainment industry journal, has reported that "Deep Throat," a pornographic film said to have had a production cost of only $40,000, has now grossed $3,415,000 in the nation's 24 major markets. It ranks 23d among all pictures premiered since January, 1972.

"Behind the Green Door," another popular pornographic film, made by the Mitchell brothers in San Francisco, was reported by Variety as having topped $1-million in gross receipts and to be currently doing $100,000 a week at the box office in 21 theaters. The Mitchell film was reportedly made for $50,000.



In San Francisco, Michael J. Kennedy, a lawyer who represents the Mitchell brothers and other major manufacturers of pornography, said that there had been panic since the Court's ruling.

"They think it's the beginning of the end," he said, "but it's not." He said that it would give impetus to a number of prosecutors and predicted a rash of arrests.

The Key Part

Mr. Kennedy said that what is likely to happen once these arrests occur depends upon whether juries convict or acquit. He said that if they acquit, there would be pressure on the legislature to give local counties or cities the power to set their own standards.

"That," he said "would mean a lot of trouble." However, if the legislature does not change the law, he said, there will be no significant change.

Mr. Kennedy said that the key part of the Court's ruling was that segment that gives the states power to set their own standards. As a result, legislatures may now permit municipalities to set their own guidelines. Thus films or literature that are permissible in one city or county may be illegal in another.

In Los Angeles, another filmmaker, Russ Meyer, said that he believed the effect of the ruling would be devastating. "You can't jeopardize investors' money," he said, explaining that it was not now known where a film was made where it could be shown.

But James Mitchell, who is 25 years old, took another view. "The young Turks don't give a damn," he said. "They'll keep on making movies. They don't know any better. After all, we're only in it to have a good time and make money."

Supreme Court Rulings Effect Here

Jitters in the Pornography Trade

By Charles Petit

So far, at least, San Francisco's hardcore sex industry appears affected only by the jitters in the wake of the U.S. Supreme Court's newest pornography guidelines.

The district attorney's office here says that for the moment, no increases in prosecution are likely. The nervous men still stand silently along the display shelves in the adult bookstores, theater owners say they don't intend to order "softer" films, and producers of sex movies here glare defiantly at the idea of censorship.

The Supreme Court decision June 21 by broadening the definition of obscenity and permitting local communities to set their own standards, has already resulted in some places, in a crackdown on pornography.

But, the decision also leaves local communities the option of not cracking down, perhaps explaining the mixed reactions to it in San Francisco.

CHAT

A clerk at a bookshop on Mason street in the Tenderloin was eager to chat about his business last week.

"Mostly tourist," he said. "They see the magazines in the window and come in. It's almost always men by themselves, and they usually just look.

"One day last week," he said, "I counted 284 men come in. I made 19 sales. Some business, huh?"

He said he's not worried about the new guidelines — at least as far as being busted is concerned.

"This is a pretty liberal town. I don't think we'll have to close down. Even if we do get hit, the worst'll be that the really hardcore stuff — penetration and things like that — will go back under the counter."

But, as did others interviewed, he said it may become more difficult to get merchandise. The materils sold — books, 8-mm movie films and full-color magazines — are almost all produced outside San Fnrcisco.

'PANIC'

And that means, said one major wholesaler of hardcore books and films here, "that guys in Los Angeles I rely on might not be able to produce movies. Believe me, in L.A., it's panic time.

"Already," he said, "some of the theater owners in San Jose have changed their orders. They want me to send them soft-core films — all simulated sex. They think what they have now might get them arrested."

The San Francisco wholesaler — who insisted his

name not be used—said the legal confusion over hardcore comes "at a rotten time for me. We've spent $60,000 for exclusive U.S. rights to a Danish 3-D movie. It's the most spectacular thing ever — it pops right out of the screen at you. I ask you, how am I going to market it if I can't assure the buyer he won't be arrested for showing it?"

BOOKS

Another bookseller is Phil Rosenberg, 54, owner of Harold's at 495 Geary street.

"Most of the books here, 85 per cent at least, are straight," he said. "I have newspapers from all over the world, intellectual magazines, the works. But, the only reason I can afford to stay open is that little section right over there."

He pointed at a [redacted] at the edge of the store. Quiet men were slowly turning pages of slick [redacted] magazines, their minds apparently absorbed completely by the portrayals of [redacted] and women earnestly coupling.

The manager [redacted] International Books [redacted] 44 [redacted] Turk street, [redacted], a 36-year-old [redacted] immigrant, [redacted] "I am not afraid. [redacted] me down, [redacted] down.

[redacted]

"I will [redacted] about six [redacted] he added. [redacted] enough money [redacted] getting else. If [redacted] Yugoslavia [redacted]

[redacted] head, five [redacted]

Artie [redacted] brother [redacted] are "Film [redacted]

with 8-minute films of nude, gyrating women and is now enjoying the profits of "Behind the Green Door" starring Marilyn Chambers, the noted former Ivory Snow model.

"We are not going to change anything, not one whit, unless someone comes in here and actually drags us off to jail," he says.

He said he plans to go ahead with distribution of another film starring Miss Chambers, "The Resurrection of Eve," and will begin work soon on "our first hardcore political satire."

ELSEWHERE

He wouldn't give many details, but he said the next venture will involve "characterizations" of President Nixon and Supreme Court Chief Justice Warren Burger.

If things seem fairly relaxed in San Francisco, that is not the case elsewhere.

What is considered completely inoffensive here may not pass other censors. Some observers predict thousands of local review boards will spring up across the country, and that their zeal to protect decency may strike at more than hardcore, raunchy sex.

Hollywood is getting nervous that any hint of impropriety may bring crushing litigation and court costs; even Playboy may mean trouble for magazine dealers.

IFFY

Nudity in nightclubs is clearly on the wane, partly because of the Supreme Court pornography decision. (But in San Francisco, the change is more the result of actions by the State Alcoholic Beverage Control Board and the board of supervisors than the Supreme Court.)

Law enforcement officials here agree that as far as books and movies are concerned, nothing has changed . . . yet.

Chief assistant district attorney Walter Giubbini said "right now we are not arresting bookstore owners and theater managers. We have lost too many cases, and the Supreme Court decision doesn't affect our current law."

But, he said, the road is open to stricter laws from either Sacramento or the county supervisors.

On Thursday of last week, a meeting was held in Los Angeles of the State Attorney General's Committee on Obscenity and Pornography.

Among those attending was Jerry Bensen, an assistant district attorney well-known in San Francisco's hardcore community for his willingness to prosecute pornography cases.

BRUNO BARDONICI
He's quitting anyway

ARTIE MITCHELL
No change, he says

PHIL ROSENBERG
Porn pays the bills

OPINION

Benson, making no effort to conceal his distaste for pornography and those producing it, said "the court decision may allow us a stricter interpretation of what is obscene."

Benson added that, if and when the laws change, "these guys shouldn't think they can simply remove pictures of actual intercourse. The Supreme Court said it is okay for communities to outlaw nudity and simulated sex, too." "Soft-core" he said, "can be just as illegal as hardcore."

But, said the man who is waiting for that 3-D movie from Denmark, "they'll never kill it. We'll fight in the courts for years, if we have to. You just can't tell a person what he can't see, and convince him it's to protect his morals. People who want pornography will always find it."

APPENDIX H

(Reference: Petition at pg. 43.)

List of hard-core pornographic films surveilled by the City of Santa Ana during a seven-year period at the Mitchell Brothers' Santa Ana Theater.

.....H-1 thru H-27

DATE	PROGRAM
11/28/75	1) Sodom and Gomorrah
	2) Behind the Green Door
11/29/75	3) Resurrection of Eve
01/22/76	1) Anyone But My Husband
	2) Previews
	3) Lady On The Couch
01/28/76	1) Inside Marilyn Chambers
	2) Previews
	3) The Fireworks Woman
02/24/76	1) Mash'd
	2) Previews
	3) Sexteen
03/10/76	1) The Milk Lady
	2) Previews
	3) The Milk Maid
03/23/76	1) Beneath the Mermaids
	2) Previews
	3) A Touch of Genie
04/03/76	1) The Story of Joanna
	2) Previews
	3) Short Feature
	4) Previews
06/02/76	1) Previews
	2) Sip the Wine
	3) Teenage Fantasies
06/08/76	1) Previews
	2) Honeymoon Sweet
	3) Defiance

06/21/76	1) Carnal Haven 2) Previews 3) Love, Lust & Violence
07/06/76	1) Previews 2) The Summer of Laura 3) Anyone But My Husband
08/16/76	1) Married Woman 2) One of a Kind
09/05/76	1) Autobiography of a Flea
10/06/76	1) The Story of Joanna 2) Autobiography of a Flea
10/20/76	1) Autobiography of a Flea 2) Sodom & Gomorrah
11/13/76	1) Oriental Blue 2) Teenage Nurses
11/24/76	1) Hungry Mouth 2) My Erotic Fantasies
12/26/76	1) Carnal Haven 2) Previews 3) Her Last Fling
01/20/77	1) Sweet Punkin, I Love You 2) Love In Strange Places
01/30/77	1) Previews 2) Sweet Punkin, I Love You
02/03/77	1) When A Woman Calls 2) Previews 3) Night Pleasures
02/17/77	1) Sensations 2) Previews 3) Kinkorama 4) Previews

03/15/77	1)	French Classmates
	2)	Previews
	3)	Roller Babies
03/20/77	1)	Sodom & Gomorrah
	2)	Previews
	3)	Autobiography of a Flea
03/30/77	1)	Teenage Cruisers
	2)	Previews
	3)	High School Fantasies
04/13/77	1)	Previews
	2)	French Blue
	3)	Overnight Sensations
04/30/77	1)	Three Shades of Flesh
	2)	Confessions of Linda Lovelace
	3)	Previews
05/11/77	1)	Previews
	2)	Sensations
	3)	The Pony Girls
05/26/77	1)	Sharon
	2)	Previews
	3)	Sensuous Vixens
06/08/77	1)	Oriental Treatment
	2)	Previews
	3)	A Dirty Western
06/22/77	1)	Liquid Lips
	2)	Previews
	3)	Tell Them Johnny Wadd Is Here
07/06/77	1)	Sweetcakes
	2)	Honey Pie
	3)	Previews

08/10/77	1) Resurrection Of Eve
	2) Lollipop Palace
	3) Previews
08/31/77	1) Second Coming Of Eva
	2) Previews
	3) Visions Of Claire
09/14/77	1) Previews
	2) Valerie
	3) The Porn Brokers
10/17/77	1) Lollipop Girls In Hard Candy
	2) Previews
	3) Mash'd
11/19/77	1) Honey Buns
	2) Previews
	3) Fantasy In Blue
07/16/78	1) Count The Ways
	2) Previews
	3) Star Babe
07/31/78	1) Opening Of Misty Beethoven
	2) Previews
	3) Journey Of "O"
08/03/78	4) Previews
08/09/78	1) Les Nympho Teens
08/10/78	2) Sleepy Head
08/20/78	1) Previews
	2) Airport Girls
	3) Previews
	4) Come Fly With Us
08/24/78	1) Through The Looking Glass
	2) S.O.S.

08/31/78	1) Previews 2) Teddy Bare 3) Expose Me Lovely
09/06/78	1) Nine Lives Of A Wet Pussy 2) Previews 3) Odyssey
09/14/78	1) A Dirty Western 2) Previews 3) The Farmer's Daughter
09/22/78	1) Virgin Dreams 2) Previews 3) Valerie
09/29/78	1) Teenage Pajama Party 2) Previews 3) Breaker Beauties
10/05/78	1) Kinky Tricks 2) A Formal Faucett
10/15/78	1) Roller Babies 2) Previews 3) Summer of Laura
10/19/78	1) Deep Throat 2) Devil In Miss Jones
11/06/78	1) One Of A Kind 2) My Erotic Fantasies
11/13/78	1) Slave Of Pleasure 2) Mash'd
1/21/78	1) Dear Pam 2) It Happened In Hollywood

11/29/78	1)	Born Erect
	2)	Abduction Of Lorelei
02/05/78	1)	Honey Buns
	2)	Happy Holiday
12/11/78	1)	Diversions
	2)	Another Love - Another Place
12/18/78	1)	Made In France
	2)	Prisoner Of Love
	3)	Previews
12/26/78	1)	Unwilling Lovers
	2)	Previews
	3)	Come With Me My Love
01/02/79	1)	Hot Cookies
	2)	Previews
	3)	Sweet Wet Lips
01/09/79	1)	Souperman
	2)	Previews
	3)	Vixens of Kung Fu
	1)	Sweet & Sour
	2)	
01/18/79	1)	Previews
	2)	Naughty School Girls
	3)	New Adventures Of Snow White
01/26/79	1)	Previews
	2)	Inserts
	3)	In The Realm Of The Senses

01/30/79	1) In The Realm Of The Senses
02/02/79	1) Previews 2) Emmanuelle 3) Story Of "O"
02/15/79	1) Previews 2) The Italian Stallion
02/21/79	1) Previews 2) The Italian Stallion 3) Baby Blue Eyes
03/04/79	1) The Italian Stallion 2) Previews 3) Night Call Nurses
03/11/79	1) Cherry, Harry & Racquel 2) Vixen 3) Super Vixens
03/18/79	1) Previews 2) The Specialist 3) Emmanuelle II
03/25/79	1) Previews 2) Carhops 3) Teenage Hitch-hikers
03/26/79	1) Teenage Hitch-hikers 2) Previews 3) Carhops

04/01/79	1) Previews 2) Deadly Weapons 3) Previews 4) Alice In Wonderland
04/04/79	1) Dona Flor And Her Two Husbands 2) Going Places
04/12/79	1) Cinderella 2) Pinocchio
04/18/79	1) Dear Pam 2) Preview 3) Barbie's Fantasy
04/26/79	1) Salon D'Amour 2) Preview 3) Love Play
05/04/79	1) The Incredible Sex Ray Machine 2) Lure Of The Triangle
05/12/79	1) Preview 2) C.B. Mamas 3) Resurrection Of Eve
05/21/79	1) V - The Hot One 2) Eruptions
05/29/79	1) Sex Wish 2) Little Angel Puss
06/06/79	1) Angel Above, The Devil Below 2) The Second Coming Of Eva

06/12/79	1) 3 A.M. 2) Naked Afternoon
06/18/79	1) Devil's Ecstacy 2) Previews 3) Foxy Lady
06/24/79	1) The Last Foxtrot In Burbank 2) Preview 3) Reflections
06/27/79	1) Lollipop Palace 2) A Taste Of Sugar 3) Previews
07/05/79	1) Teen Pony Girls 2) The Erotic Adventures Of Candy
07/12/79	1) Moonshine Girls 2) Previews 3) The Erotic Adventures of Candy
07/24/79	1) Previews 2) French Shampoo 3) Slippery When Wet
07/28/79	1) Anita, The Swedish Nymphet 2) Honeycomb 3) Previews
08/02/79	1) Candy Stripers 2) Previews 3) My Wife The Hooker

08/17/79	1) Preview 2) Visions 3) Once Over Nightly
08/23/79	1) Temptations 2) Previews 3) Blond Velvet
08/30/79	1) Captain Lust And The Amorous Contesse 2) Previews 3) Femmes De Sade
09/06/79	1) Reflections 2) Previews 3) Soft Places
09/13/79	1) Pleasure Masters 2) Previews 3) Baby Face
09/20/79	1) Steam Heat 2) Previews 3) Masterpiece
09/27/79	1) Fantasy Girl 2) Violation Of Claudia
10/04/79	1) Marianne Bouquet 2) Previews 3) Sins Of Reverend Starr
10/10/79	1) Lusty Princess 2) Previews 3) Her Last Fling
0/17/79	1) Come Under My Spell 2) Previews 3) The New Erotic Adventures Of Cassanova

10/25/79	1) Painful Desires 2) Previews 3) Sensual Enccun- ters Of Every Kind
11/01/79	1) Desires Within Young Girls 2) Sex Roulette 3) Previews
11/08/79	1) Bangkock Connection 2) Previews 3) Night After Night
11/15/79	1) Satan Was A Lady 2) Laura's Desires 3) Previews
11/23/79	1) All Night Long 2) Portrait Of Seduction
11/30/79	1) Love Airlines 2) Hot Channels
12/06/79	1) Confessions 2) The Joy Of Letting Go 3) Previews
12/12/79	1) Previews 2) Sugar Britches 3) Teeny Buns
12/20/79	1) Sweet Cakes 2) Previews 3) Thunderbuns
12/27/79	1) Sensual Encoun- ters Of Every Kind

2) Velvet Edge
3) Previews

01/03/80 1) Previews
2) Beach House
3) Butterflies

01/09/80 1) Debbie Does Dallas
2) Hot Cookies
3) Previews

01/24/79 1) Previews
2) Sweet Sixteen
3) A Coming Of Angels

02/01/80 1) Lust Flight 2000
2) Previews
3) Januarius

02/10/80 1) Previews
2) Expensive Taste
3) Fantasex

02/17/80 1) Carnal Highways
2) Previews
3) Fantastic Orgy

02/24/80 1) Heat Wave
2) Previews
3) Handful Of Diamonds

03/02/80 1) Jungle Blue
2) Previews
3) I Am Always Ready

03/09/80 1) Pretty Peaches
2) Pleasure Masters

03/15/80	1)	Three Ripening Cherries
	2)	Previews
	3)	Swinging Senator
03/21/80	1)	Peach Fuzz
	2)	Previews
	3)	The Final Sin
03/30/80	1)	Little Girls Blue
	2)	Straw Hat
04/01/80	1)	Little Girls Blue
	2)	Previews
	3)	Straw Hat
04/05/80	1)	Taxi Girls
	2)	Baby Face
04/13/80	1)	Disco Lady
	2)	Previews
	3)	The Jade Puasycat
04/20/80	1)	Soft Places
	2)	Previews
	3)	Hot Honey
04/27/80	1)	China Cat
	2)	Hard Soap, Hard Soap
05/04/80	1)	The Sensuous Detective
	2)	Captain Lust
05/10/80	1)	Sweet Throat
	2)	The Dental Nurses
05/17/80	1)	Previews
	2)	That Lady From Rio

	3)	Lady On A Couch
05/25/80	1)	Virgin Snow
	2)	Previews
	3)	Sweet Taste Of Honey
05/30/80	1)	Exploring Young Girls
	2)	Previews
	3)	When A Woman Calls
06/08/80	1)	Previews
	2)	Dirty Lilly
	3)	The Love Bug
06/15/80	1)	The Secret Dreams Of Mona Q
	2)	The Teenage Sex Maids
06/22/80	1)	Previews
	2)	Once Upon A Time
	3)	Blue Perfume
06/29/80	1)	The Seduction Of Amy
	2)	Tenderloins
	3)	Previews
07/06/80	1)	From Holly With Love
	2)	Previews
	3)	The Night Bird
07/13/80	1)	The Affairs Of Janice

	2)	Previews
	3)	The Pleasure Shoppe
07/20/80	1)	Sensational Janine
	2)	Previews
	3)	Desires Within Young Girls
07/27/80	1)	Reunion
	2)	Previews
	3)	A Woman's Torment
08/03/80	1)	Mary, Mary
	2)	Previews
	3)	Beyond Fulfillment
08/10/80	1)	The Health Spa
	2)	Previews
	3)	Angel On Fire
08/18/80	1)	Previews
	2)	Blazing Zippers
	3)	Surfer Girls
08/22/80	1)	Tapestry Of Passion
	2)	Previews
	3)	Strangers
08/29/80	1)	Night Caller
	2)	Previews
	3)	Her Attractions
09/05/80	1)	Sensual Fire
	2)	Previews
	3)	The New Erotic Adventures Of Cassanova

09/13/80	1) Previews 2) Champagne Orgy 3) Lusty Princess
09/19/80	1) Previews 2) Little Orphan Sammy 3) Masterpiece
09/28/80	1) Honeysuckle Rose 2) Previews 3) Soft Places
10/04/80	1) Chinese Fortune Cookies 2) Previews 3) The Violation Of Claudia
10/11/80	1) Farewell Scarlet 2) Preview 3) Sweet Savage
10/18/80	1) Previews 2) Beach House 3) Her Name Was Lisa
10/25/80	1) Previews 2) The Girls Of Mr. X 3) Laura's Desires
11/01/80	1) The Education Of A Baroness 2) Previews 3) Butterflies
11/08/80	1) Previews 2) Satin Suite 3) Temptations

11/15/80	1)	The Fur Trap
	2)	Previews
	3)	Sweet and Sour
11/22/80	1)	Fulfilling Young Cups
	2)	Ecstacy In Blue
	3)	Previews
11/29/80	1)	Previews
	2)	Swedish Minx
	3)	UNTITLED - My Sex-Rated Wife
12/06/80	1)	Previews
	2)	Pro Bowl Cheerleaders
	3)	Little Girls Blue
12/14/80	1)	The Divine Obsession
	2)	Previews
	3)	Hungry Young Women
12/19/80	1)	Double Your Pleasure
	2)	The Passions Of Carol
	3)	Previews
12/26/80	1)	The Legend Of Lady Blue
	2)	Previews
	3)	Marianne Bouquet
01/02/81	1)	French Teen
	2)	Previews
	3)	Sweet Throat

01/09/81	1)	Lady On A Couch
	2)	Previews
	3)	Here Comes The Bride
01/16/81	1)	Previews
	2)	Oriental Blue
	3)	Baby Love And Bean
01/27/81	1)	Previews
	2)	Dental Nurses
	3)	Bad Penny
01/31/81	1)	Sweet Heart
	2)	Bablon Pink
	3)	Previews
02/08/81	1)	Previews
	2)	7 Into Snowy
	3)	All About Gloria Leonard
02/14/81	1)	Previews
	2)	Barbara Broadcast
	3)	The Private Afternoons of Pamela Mann
02/21/81	1)	Previews
	2)	The Sensuous Detective
	3)	Playthings
02/28/81	1)	Femmes Desade
	2)	Previews
	3)	Intimate Desires
03/07/81	1)	Previews
	2)	Pretty Peaches
	3)	Sweet Sweet Freedom

03/14/81	1) Previews 2) Weekend Fantasies 3) Jail Bate
03/21/81	1) Summertime Blue 2) Previews 3) Oriental Treatment
03/28/81	1) Serena, An Adult Fairy Tale 2) Previews 3) Candi Girl
04/04/81	1) Previews 2) Hot Child In The City 3) Skin Flicks
04/12/81	1) Teeny Buns 2) Previews 3) Daisey May
04/15/81	1) Pet Of The Month 2) Previews 3) Wet Lady
04/22/81	1) Previews 2) Gangster Girls 3) A Coming Of Angels
05/02/81	1) White Heat 2) Previews 3) Jackpot
05/09/81	1) Cry For Cindy 2) Previews 3) The Joy Of Letting Go

05/16/81	1) Previews 2) Oriental Baby Sitter 3) China Sisters
05/23/81	1) Previews 2) Touch Me 3) The Untamed
05/30/81	1) China Girl 2) Previews 3) Black Silk Stockings
06/06/81	1) Previews 2) Portrait Of Seduction 3) The First Time
06/13/81	1) Sexual Heights 2) Three Ripening Cherries 3) Previews
06/20/81	1) Champagne Orgy 2) Preview 3) Undulations
06/27/81	1) Previews 2) Desire Within Young Girls 3) The Ecstacy Girls
07/05/81	1) The Night Bird 2) Preview 3) Sex Boat
07/11/81	1) Sex Roulette 2) Preview 3) Angie, Under-cover Cop

07/19/81	1)	The Pink Ladies
	2)	Previews
	3)	Sweet Punkin
07/26/81	1)	Previews
	2)	Thoroughly Amorous Amy
	3)	Blow Dry
08/01/81	1)	Previews
	2)	Getting Off
	3)	The Liberation Of Honey Doll Jones
08/08/81	1)	Taxi Girls
	2)	Preview
	3)	Cat Tails
08/16/81	1)	Robin's Nest
	2)	Previews
	3)	Jail Bait
08/22/81	1)	Intrusions
	2)	Previews
	3)	Bella
08/29/81	1)	All Night Long
	2)	Previews
	3)	Alice In Wonderland
9/05/81	1)	Blazing Zippers
	2)	Hot Lunch
	3)	Previews
09/12/81	1)	Previews
	2)	Surfer Girls
	3)	Expectations
09/19/81	1)	Confessions
	2)	Previews
	3)	Intimate Illusions

09/27/81	1)	Previews
	2)	Hot and Sexy Pizza Girls
	3)	Sweet Secrets
10/03/81	1)	Hard Soap, Hard Soap
	2)	Preview
	3)	Blond Fire
10/10/81	1)	Previews
	2)	Jade Pussycat
	3)	Sweet Captive
10/17/81	1)	Coed Feaver
	2)	The Pleasure Shoppe
	3)	Previews
10/24/81	1)	Sex World
	2)	Health Spa
	3)	Previews
11/01/81	1)	Sunny
	2)	More Than Sisters
	3)	Previews
11/08/81	1)	Previews
	2)	European Lovers
	3)	American Pie
11/15/81	1)	Exposed
	2)	Previews
	3)	Heavenly Desire
11/21/81	1)	Previews
	2)	How Sweet It Is
	3)	Preview
	4)	Bad Company

11/27/81	1) Preview 2) For Members Only 3) Plato's The Movie 4) Previews
12/06/81	1) Chopstix 2) Preview 3) Baby Face
12/12/81	1) Tangerine 2) Previews 3) Ms. Magnificent
12/19/81	1) Preview 2) From Holly With Love 3) One Last Score
12/26/81	1) Justine 2) Previews 3) Captain Lust
01/02/82	1) Hot Honey 2) Preview 3) Small Town Girls
01/09/82	1) Preview 2) Fantasex 3) Mystique
01/15/82	1) Chinese Fortune Cookie 2) Previews 3) Little Blue Boy

01/23/82	1) Downstairs, Upstairs 2) Previews 3) Diary of My Secret Life
01/29/82	1) Starship Eras 2) Previews 3) Wives Will Play
02/05/82	1) Kate And The Indians 2) Previews 3) Oh Fanny
02/15/82	1) American Pie 2) Preview 3) Rhinestone Cowgirls
02/19/82	1) All About Gloria Leonard 2) Preview 3) Fiona On Fire
02/27/82	1) Babylon Pink 2) Previews
03/05/82	1) Dirty Lilly 2) Previews
03/12/82	1) Previews 2) Easy 3) Naked Afternoon
03/19/82	1) Foxy Lady 2) Previews 3) Practice Makes Perfect

03/26/82	1) Second Coming Of Eva 2) Previews 3) Aunt Peg
04/02/82	1) Previews 2) Hot Rockets 3) Three AM
04/08/82	1) Three Senators Daughters 2) Previews 3) 800 Fantasy Lane
04/15/82	1) Interlude of Lust 2) Previews 3) Undulations
04/23/82	1) The Love Witch 2) Previews 3) Shoppe Of Temptations
05/03/82	1) Please, Please Me 2) Preview 3) N.Y. Babes
05/05/82	1) Candy Stripers 2) Meat Ball
05/13/82	1) Anna Obsessed 2) Previews 3) Wet Rainbow
05/21/82	1) Telefantasy 2) Do You Want To Be Loved

05/31/82	1)	All About Women
	2)	Preview
	3)	Olympic Feaver
06/06/82	1)	Previews
	2)	Skinflicks
	3)	Naughty Network
06/10/82	1)	Amanda By Night
	2)	Previews
	3)	The Girls Of Mr. X
06/21/82	1)	Previews
	2)	Coed Feaver
	3)	Pandora's Mirror
06/28/82	1)	Previews
	2)	The Secret Dreams of Mona Q
	3)	Jack 'N Jill
07/05/82	1)	Here Comes The Bride
	2)	Previews
	3)	Satin Suite
07/11/82	1)	Previews
	2)	Virgin Snow
	3)	Blue Magic
07/18/82	1)	Previews
	2)	Extremes
	3)	Education Of A Baroness

07/25/82	1) Honey Throat 2) Previews 3) Exploring Young Girls
07/31/82	1) Previews 2) Little Me & Maria Strange-love 3) Taboo

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No. 82-345

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

EDWARD COOPER, CITY ATTORNEY OF THE CITY OF SANTA ANA,
Petitioner,

VS.

MITCHELL BROTHERS' SANTA ANA THEATRE, et al.,
Respondents.

On Petition for a Writ of Certiorari to the California Court of Appeal, Fourth Appellate District

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a party may present issues for certiorari in this Court, one year after the Court has denied certiorari on the same issues in the same case, and five months after the Court has denied a motion to permit leave to petition for re-hearing.

2. Whether California violates the United States Constitution by defining only the exhibition of obscene motion pictures as a public nuisance, and not the theater where such pictures are shown, nor the films themselves.

3. Whether the United States Constitution requires the State of California enact legislation providing city attorneys with attorney's fees in civil trials for public nuisances.

LIST OF PARTIES

Petitioner is the City Attorney of the City of Santa Ana, California, acting in his official capacity.

Respondents are Mitchell Brothers' Santa Ana Theater, a motion picture theater located in the City of Santa Ana, California, M B.F.G. Theatre Circuit, a division of Cinema 7, Inc., a California corporation, which operates the theater, Demich, Inc., a California corporation, James Mitchell and Artie Mitchell, of San Francisco, California, who are principal stockholders and controlling officers of the respondent corporations, and who are also the general partners in Mitchell Brothers Film Group, a California general partnership.

The other parties listed by the petitioner as respondents did not appear at trial nor in any of the myriad post-trial proceedings, and should not be included in this action.

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RESPONDENTS' BRIEF IN OPPOSITION

THE OPINION BELOW

The opinion of the Court of Appeal (Fourth Appellate District, Division 2 (following remand from this Court), is reported in 128 Cal.App.3d 937.

JURISDICTION

The opinion of the Court of Appeal (following remand from this Court) was filed on February 18, 1982. A timely petition for hearing in the California Supreme Court was filed on March 29, 1982. The California Supreme Court denied the petition on May 27, 1982. On June 3, 1982, the Court of Appeal filed its remittitur. This petition for cer-

tiorari was filed within ninety days from the date the judgment became final. Petitioners invoke this Court's jurisdiction under 28 U.S.C. Section 1257(3) and Rules 17(b) and 17(c) of the U.S. Supreme Court.

STATEMENT OF THE CASE

This Court granted certiorari in this case in Docket No. 81-271, *Cooper v. Mitchell Brothers, etc.* (1981) — U.S. —, 102 S.Ct. 172, 70 L.Ed.2d 262, on the sole issue of standard of proof of obscenity in civil actions. The Court specifically denied certiorari on the other two questions presented.

Following summary reversal on that issue, the case was remanded to the California Court of Appeal which, in February 18, 1982, held that California did not have a stricter standard of proof than required by this Court's decision, and remanded the matter to the trial court for further proceedings. In all other respects it affirmed its first opinion. *People ex rel Cooper v. Mitchell Brothers', etc.* (1982) 128 Cal.App.3d 937.

Unsatisfied, petitioner sought hearing in the California Supreme Court and also, in April, 1982, submitted a motion to this Court for leave to file a petition for re-hearing, a motion which was denied. *Cooper v. Mitchell Brothers', etc.* (1982) — U.S. —, 102 S.Ct. 1779-1780.

The California Supreme Court denied the petition for hearing on May 27, 1982, and the Court of Appeal issued its remittitur to the trial court on June 3, 1982.

STATUTORY PROVISIONS INVOLVED

California Code of Civil Procedure:

§ 731. [Right to bring action to enjoin or abate nuisance, and to recover damages: Abatement of public nuisance]

An action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by a nuisance, as the same is defined in section thirty-four hundred and seventy-nine of the Civil Code, and by the judgment in such action the nuisance may be enjoined or abated as well as damages recovered therefor. A civil action may be brought in the name of the people of the State of California to abate a public nuisance, as the same is defined in section thirty-four hundred and eighty of the Civil Code, by the district attorney of any county in which such nuisance exists, or by the city attorney of any town or city in which such nuisance exists, and each of said officers shall have concurrent right to bring such action for a public nuisance existing within a town or city, and such district attorney, or city attorney, of any county or city in which such nuisance exists must bring such action whenever directed by the board of supervisors of such county or whenever directed by the legislative authority of such town or city.

Enacted 1872; Amended Stats 1905 ch 128 § 1.

§ 1021.5. [Attorney fees in cases resulting in public benefit]

Upon motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial

burden of private enforcement are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any. With respect to actions involving public entities, this section applies to allowances against, but not in favor of, public entities, and no claim shall be required to be filed therefor.

Added Stats 1977 ch 1197 § 1.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I

THE QUESTIONS PRESENTED HAVE ALREADY BEEN RULED ON BY THIS COURT IN THIS CASE

Petitioner admits that he seeks review of the same questions which this Court declined to hear when the case first was presented in Docket No. 81-271. Petitioner is less than candid in failing to point out that he has also moved the Court for leave to file an out-of-time petition for re-hearing on these issues, a motion which was denied. *Cooper v. Mitchell Brothers', etc.* (1982) — U.S. —, 102 S.Ct. 1779-1780.

He states that there are two reasons why the Court should now take up these issues: changed circumstances, and refinement of the issues.

But the claimed changed circumstances are the same as those set forth in his earlier motion, that is, that the Court was denied the opportunity to rule on the issues when the appeal was dismissed in *U.S. Marketing, et al., v. Idaho* (1982) —— U.S. ——, 102 S.Ct. 1649, 79 L.Ed.2d 291. However, this Court denied certiorari in this case prior to any

decision in *U.S. Marketing*, so circumstances were not changed by that dismissal.

Nothing, in fact, has happened since the Court denied the motion to file a petition for re-hearing except that the California Supreme Court has refused a hearing on these issues after the California Court of Appeal issued its ruling on remand from this Court, a ruling that agreed on all points with this Court's decision in Docket Number 81-271. *See, People ex rel Cooper v. Mitchell Brothers', etc.* (1982) 128 Cal.App.3d 927. The circumstances remain exactly what they were when this Court first declined to review these questions.

As to the claim of "refinement" of the issues, petitioner is apparently referring to the fact that his brief is now longer than it was before, and therefore he asks the Court to hear this "better" version. If this Court should develop a policy of permitting a second hearing because the first brief was not sufficient, it will become the practice of unsuccessful petitioners to re-submit brief after brief until they finally get it right. Without question, many attorneys will swiftly adopt petitioner's practice of storing large chunks of text on word-processors to save the expense of having to actually re-write most of the second, third, and successive briefs.[1]

---

[1]Note that all but four of the twenty-two pages of the "Statement of the Case" here are verbatim from the "Statement of Facts" in the first petition, Docket No. 81-271. Interestingly, and most probably mistakenly, the hundreds of pages of "Time and Motion Studies" in the instant petition are not copies of the first petition, but rather copies of those submitted in a series of copyright cases, this Court's docket numbers 81-2094 through 81-2096. Such practice certainly saves the petitioner time and expense but does little for those who must read both briefs.

There are no changed circumstances, merely making an argument lengthier does not refine it, and even if the issues were presented in a superior form, there are sound policy reasons for declining to permit a petitioner to present his case over and over again to this Court until he gets it right.

II

NO FEDERAL QUESTION IS PRESENTED BY THE CALIFORNIA DECISION ON REMEDIES FOR NUISANCE

The Court of Appeal's first decision, *People ex rel Gow v. Mitchell Brothers', etc.* (1981) 114 Cal.App.3d 923, which was affirmed in all particulars except the issue of standard of proof, *People ex rel Cooper v. Mitchell Brothers', etc.* (1982) 128 Cal.App.3d 937, 941, held that, "injunctive relief against those movies found to be obscene is the only remedy allowable under the public nuisance statutes." 114 Cal.App. 3d at 930. The decision is based on the legislation involved, and not on any federal question.

A. Under California's Public Nuisance Statutes, as Construed by the California Courts, It Is the Exhibition of Obscene Motion Pictures Which Constitutes the Nuisance, and Not the Theater Where Shown Nor the Films Themselves

Petitioner tries to raise the denial of all remedies but for injunctive relief to a constitutional level by claiming that the Court of Appeal based its denial on some theory of prior restraint. This, at best, is misleading. The Court of Appeal explained in its opinion that the city attorney, in seeking the additional remedies of theater closure, etc., misconstrued just what was the nuisance to be abated. It

is the *exhibition* of the films, and not the films or the theater which constitutes the public nuisance.

> "Once it is recognized that the public nuisance is nothing more than the act of exhibiting obscene films, it becomes apparent why all the remedies, save the injunction, are inappropriate." *People ex rel Gow v. Mitchell Brothers', etc.* 114 Cal.App.3d 932.

See, People ex rel Busch v. Projection Room Theater (1976) 17 Cal.3d 42, 51-52 and 57. There is certainly no federal question as to whether California has the right to make its own definition of what a public nuisance is.

Apparently under the hopes that something might work, the city attorney again, as in the petition in Docket 81-271, asserts in the Questions Presented that he has been denied his rights not only under the Fourteenth Amendment, but also the Ninth and Tenth Amendments, but makes no mention of the latter two provisions at any place in his argument. Perhaps he fears to do so as any such argument would be even more frivolous than those he has presented, and even he must beware the Court's censure.

B. In California Nuisance Actions, Money Damages Are Not Permitted Where the Plaintiff Is a Public Official

The California Court of Appeal pointed out that the basis for this case was California Code of Civil Procedure Section 731, which distinguishes between actions brought by private individuals and public officers. The Court said:

> "It is clear that the Legislature intended that one type of litigant could seek abatment *and* damages, while the other type of litigant could obtain abatement only. A city attorney, in an action, 'brought in the name of the People,' fits squarely and exclusively in the latter classification." *Id.*, 114 Cal.App.3d at 930.

The Court stated that the city attorney's efforts to liken himself to a private citizen, "border on the frivolous" *Id.*, 114 Cal.App.3d at 931.

C. There Is Neither Statutory Nor Constitutional Grounds for the Award of Attorney's Fees to a City Attorney in a California Action for Nuisance

The petitioner, a public officer acting in his official capacity as the city attorney of Santa Ana, California, again urges that he is to be treated as a private individual who fits within the parameters of those entitled to attorney's fees under the "private attorney general" theory of *Serrano v. Priest* (1977) 20 Cal.3d 25. That case held that where, as a result of the efforts of private individuals, state constitutional rights of societal importance were protected to the benefit of a large number of people, and where, in the circumstances of the case, the necessity for *private* enforcement placed upon the plaintiff a burden out of proportion to his individual stake in the matter, he may be awarded attorney's fees in the exercise of the court's equitable powers. *Serrano v. Priest, supra,* 20 Cal.3d at 46. Since the petitioner here is not a private individual, it is not necessary to discuss whether the result of his litigation was protection of important constitutional rights of societal importance.

The necessity that the successful party be a private citizen and not a public officer was made crystal clear by the California Legislature which, following the *Serrano* decision, codified the policy in Code of Civil Procedure Section 1021.5. That section, after setting forth the circumstances for an award of attorney's fees, provided:

"With respect to actions involving public entities, this section applies to allowances against, but not in favor of, public entities. . . ."

A city attorney, bringing an action in the name of the People of the State of California, is simply not entitled to attorney's fees under the law of California and, again quoting from Justice Morris, this petitioner's efforts to liken himself to a private individual "border on the frivolous." *See, People ex rel Gow v. Mitchell Brothers', etc., supra*, 114 Cal.App.3d 923, 931.

Petitioner argues that this decisional and statutory law denies him, and the City of Santa Ana, equal protection of the law, but cites no authority for the proposition that such rights adhere to a governmental unit rather than an individual.

He next argues that denial of attorney's fees to him is the taking of property without due process of law, which must be one of the more specious arguments to be presented to this Court this Term. He doesn't explain who is doing the taking, or what the property is, but states that since private citizens cannot abate a moral nuisance (citing as authority two denials of certiorari in this Court, *Harmer, et al v. Deep Throat* (1977) 430 U.S. 907, and *Harmer, et al v. Devil in Miss Jones* (1977) 430 U.S. 937) it is a taking of property without due process to not give attorney's fees to a public official who does seek such abatement. Apparently his point is that if private individuals could seek abatement they would be entitled to attorney's fees (a questionable proposition at best) and therefore when public officials seek abatement they must be allowed attorney's fees under some constitutional provision. His cited authority is *Nebbia v. New York* (1934) 291 U.S. 502

and *Skinner v. Oklahoma* (1942) 316 U.S. 535. While it is certainly true that those two cases are landmark decisions on due process and equal protection, it is difficult to understand the relevance of milk board price controls and the sterilization of habitual criminals to the matter now before the Court.

Adding to the spurious character of the argument, the petitioner asserts that if he had not prevailed on the issue of standard of proof in this case, the Mitchell Brothers would have been entitled to attorney's fees against him under the authority of 42 U.S.C. Section 1983 and 1988. Naturally, he cites no authority for this novel idea.

CONCLUSION

It is respectfully requested that the Court deny the petition for writ of certiorari in all particulars.

Dated: September 16, 1982

Respectfully submitted,

ROBERT L. THORP
Counsel for Respondents

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Respondents.

On Petition for a Writ of Certiorari to the California Court of Appeal, Fourth Appellate District

PETITIONER'S REPLY AND SUPPLEMENTAL BRIEF

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I

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PETITIONER'S REPLY AND SUPPLEMENTAL BRIEF

Pursuant to Rules 22.5 and 22.6 of the U.S. Supreme Court Rules, Petitioner files the following Reply and Supplemental Brief

to the Respondents' Brief in Opposition herein.

The supplemental portion of Petitioner's brief is addressed to new legislation; namely, Civil Code §3496, added by Statutes of 1982, Chapter 1267 (S.B. 1720), enacted by the California State Legislature subsequent to the date on which the Petition for Writ of Certiorari herein was filed. Civil Code §3496, which was signed into law by Governor Edmund Brown, Jr. on September 20, 1982, and will become effective on January 1, 1983, reads as follows:

> SECTION 1. Section 3496 is added to the Civil Code to read:
>
> 3496. In a case in which the court enjoins the sale, distribution, or public exhibition, for commercial consideration, of obscene matter, as defined in Section 311 of the Penal Code, the court may award costs to the prevailing government agency which brought the action. Such costs may include the costs of investigation and reasonable attorney fees. (Our emphasis.)

Under the rule of law expressed by Justice Tobriner in Woodland Hills Residents Assn.,

Inc. v. City Council of Los Angeles, et al., 23 Cal.3d 917 at 929-932, 154 Cal.Rptr. 503 at 508-510 (Apr. 3, 1979), Civil Code §3496 (legislation on attorney fees) applies retrospectively to all cases in which an appeal has not been finally determined when the statute becomes effective (Jan. 1, 1983). Petitioner contends that Civil Code §3496 states in explicit language what implicitly has been the law in California up to the Court of Appeal's decision herein in People ex rel. Gow v. Mitchell Brothers' Santa Ana Theater, et al., 114 Cal.App.3d 923 (Jan. 20, 1981), reversed and remanded on "Burden of Proof" Question in Cooper v. Mitchell Brothers' Santa Ana Theater, et al., No. 81-271, ___ U.S. ___, 70 L.Ed.2d 262, 102 S.Ct. 272 (Nov. 30, 1981); reiterated, in part, in People ex rel. Cooper v. Mitchell Brothers' Santa Ana Theater, et al., 128 Cal.App.3d 937 (Feb. 18, 1982).

ARGUMENT

I

THIS COURT'S DENIAL OF ITS WRIT OF CERTIORARI AS TO QUESTIONS 1 (CLOSURE) AND QUESTION 3 (DUE PROCESS AND EQUAL PROTECTION OF THE LAW) IN EDWARD COOPER V. MITCHELL BROTHERS' SANTA ANA THEATER, ET AL. ON NOV. 30, 1981, WHILE AT THE SAME TIME GRANTING ITS WRIT AS TO QUESTION 2 (BURDEN OF PROOF) AND SUMMARILY REVERSING THE COURT OF APPEAL'S JUDGMENT THEREIN, IMPORTS NO EXPRESSION OF OPINION UPON THE MERITS OF QUESTIONS 1 AND 3 AS AGAIN PRESENTED TO THIS COURT IN THE PETITION HEREIN UPON ADDITIONAL FACTS.

Respondents' contention at Proposition I of their opposition (see Respondents' Brief in Opposition at page 4) that "The Questions Presented Have Already Been Ruled On By This Court In This Case" is without merit. The general rule is that a simple order denying a petition for writ of certiorari as to a federal question is not designed to reflect the Court's views either as to the merits of the case or as to its jurisdiction to hear the matter. See, Stern and Gressman, Supreme Court Practice, Fifth Edition, pp. 353-360 (1978). As is noted in

the Stern and Gressman text at p. 353, this absence of precedential value as to the denial of certiorari is particularly appropriate where the decision sought to be reviewed is essentially a factual determination, United States v. Shubert, 348 U.S. 222, 229 n. 10. Here, the facts show that Petitioner was accorded complete relief in his first Petition and the Court of Appeal's judgment was summarily reversed on another issue.

Petitioner filed his first Petition for Writ of Certiorari in Docket No. 81-271, People ex rel. Cooper v. Mitchell Brothers' Santa Ana Theater, et al., on August 10, 1981. Subsequently, in his Petitioner's Reply and Supplemental Brief, filed in the same case on or about Nov. 19, 1981, Petitioner called this Court's attention to the fact that the "closure" issue in Question 1 was now also before the U.S. Supreme Court for decision in the

jurisdictional statement in Docket No. 81-741, U.S. Marketing, Inc. v. State of Idaho ex rel. Kidwell, et al., filed on October 15, 1981, and requested that the Court not rule upon his Petition for Writ of Certiorari until it considered the jurisdictional statement in the Idaho appeal.[1] Although a majority of this Court decided on Nov. 30, 1981 to act immediately and grant the Writ on Petitioner's Question 2 and reverse the Court of Appeal judgment below summarily, the failure of that same majority to also act on Question 1 (closure) cannot, under the accompanying circumstances, be construed as a ruling against the Petitioner on the merits of Question 1. Further, this Court did note jurisdiction on the "closure" issue six weeks later in Docket No. 81-741, U.S. Marketing, Inc., et al. v. Idaho et al., ___ U.S. ___, 71

[1] See Petitioner's Reply and Supplemental Brief in No. 81-271 at pages 10-13, a copy of which pages is attached hereto at Appendix "A".

L.Ed.2d 291, ___ S.Ct. ___ (Jan. 11, 1982), thereby finding the "closure" issue to present a substantial federal question which was ripe for review.

Thereafter, when this Court was precluded from ruling on the "closure" issue by U.S. Marketing, Inc.'s voluntary dismissal of their appeal under Rule 53 on March 10, 1982, Petitioner attempted to again bring the "closure" issue before this Court in his Motion for Leave To File Out-of-Time Petition for Rehearing, With Petition for Rehearing Annexed. In that motion, filed with this Court on March 14, 1982, Petitioner alleged as an intervening circumstance of substantial effect, and grounds therefore, this Court's having noted jurisdiction on the "closure" issue on Jan. 11, 1982 in U.S. Marketing, Inc., et al., supra. As in the case of the denial of the first Petition for Writ of Certiorari as to Question 1, above noted, Respondents

similarly contend that the denial of such motion on April 5, 1982 weighs against Petitioner's claim of an "intervening circumstance" (see Brief in Opposition at page 4). That contention is also without merit and for a similar reason to that given above. In view of the statistics, which recount an overwhelming lack of success, generally, with Petitions for Rehearing, see Stern and Gressman, Supreme Court Practice, Fifth Edition, page 790, the denial of such motion cannot be claimed to weigh against either Petitioner's claim of a "changed circumstance" or the merits of the "closure" issue as presented herein in Docket No. 82-345.

II

THE CALIFORNIA COURT OF APPEAL'S DECISION BELOW PRESENTS A NUMBER OF SUBSTANTIAL SUBSIDIARY FEDERAL QUESTIONS.

(A) The Court Of Appeal's Opinion Violates The U.S. Constitution By Ignoring The Provisions Of Santa Ana Ordinance N.S. 1325, §12-102(a)(1) Which Make Any . . . Place In The City Of Santa Ana Where (1) Lewd Films Are Publicly Exhibited As A Regular Course Of Business . . . A Public Nuisance Per Se.

Respondents argue (see Brief in Opposition at page 6): "The decision is based on the legislation involved, and not on any federal question." In their attempt to paint the opinion of the Court of Appeal below as simply presenting a matter of state law, against Petitioner's claim that substantial federal questions have been raised involving a denial of due process of law and equal protection of the law and a Constitutionally inadequate judicial remedy (Question 2), Respondents have framed a subsidiary question of their own. See "Questions Presented" at Question 2 of the Brief in Opposition, reading:

> "2. Whether California violates the United States Constitution by defining only the exhibition of obscene motion pictures as a public nuisance, and not the theater where such pictures are shown, nor the films themselves?" 2/

2/ Respondents have made the above issue a part of their defense to the Petition for Writ of Certiorari herein. Petitioner's Reply is directed to Respondents' Question 2 as a "subsidiary question fairly included" within Petitioner's Question 2. See Rule 21.1(a) of the Rules of the U.S. Supreme Court.

Respondents assert as an affirmative proposition to their "straw man" Question that (Brief in Opposition at page 6):

> "A. Under California's Public Nuisance Statutes, as Construed by the California Courts, It Is The Exhibition of Obscene Motion Pictures Which Constitutes The Nuisance, and not the Theater Where Shown Nor The Films Themselves."

After citing People ex rel. Busch v. Projection Room Theater, (1976) 17 Cal.3d 42, 51-52 and 57 in support of that proposition, Respondents conclude:

> "There is certainly no federal question as to whether California has the right to make its own definition of what a public nuisance is." (Brief in Opposition at page 7.)

If the record were merely that which is stated above, Respondents' "straw man" defense might have merit, but such is not the case. There is no question but that the Busch decision says exactly what Respondents claim it says as to Civil Code §3479 and §3480 and Penal Code §370, but the record also shows that Santa Ana Ordinances N.S.

1287 and N.S. 1325, §12-102(A)(1) (see Appendix at B-100 and B-122) has further legislatively declared that:

> "Any . . . place in the City of Santa Ana where . . . (1) lewd films are publicly exhibited as a regular course of business . . . is a public nuisance per se."

Further, the public nuisance complaint alleged that the City Council had acted by Resolution to declare the place a public nuisance and in violation of Ordinance N.S. 1325 (see Petition for Writ of Certiorari at page 13).

The variance between the Court of Appeal's opinion on the point which Respondents have raised above and the record herein, regarding the Santa Ana Ordinances and arguments thereon (which the California Court of Appeal opinion ignored), was framed as Question 3 of the Reasons for Granting a Hearing in the Santa Ana City Attorney's Petition for Hearing filed in the California Supreme Court on March 28, 1982, reading as

follows:

> " Whether the Court of Appeal's refusal to enforce Santa Ana Ordinances N.S. 1287 and 1325 (which declare places exhibiting obscene films within the City and prints used to exhibit obscene films within the City to be a public nuisance), enacted pursuant to the specific grant of authority to cities in Government Code Section 39771 to declare what constitutes a public nuisance and to provide for a procedure to abate such public nuisance, was arbitrary and is a usurpation of the legislative power of the City of Santa Ana."

Petitioner's arguments as to Question 3 of the Reasons for Granting a Hearing appeared as Point III in the Petition for Hearing in the California Supreme Court at pages 38 et seq. A copy of that portion of the record below is set forth at Appendix "B" to this Reply and Supplemental Brief.

Petitioner submits that the record noted above, appearing herein at Appendix "B", does not permit the Respondents to assert the defensive proposition set forth in Point IIA of their Brief in Opposition.

(B) The Court Of Appeal's Opinion Violates The U.S. Constitution By Denying The City Attorney, Acting For And On Behalf Of The Residents Of Santa Ana, The Right To Recover Damages From The Public Nuisance Which Has Been Established. Such Denial Constitutes A Taking Of Property Without Due Process Of Law.

Respondents further assert as an affirmative proposition in support of their "straw man" Question (see Brief in Opposition at page 7):

> "2B. In California Nuisance Actions, Money Damages Are Not Permitted Where The Plaintiff Is A Public Official."

and refer to that part of the Court of Appeal's opinion reading:

> "It is clear that the Legislature intended that one type of litigant could seek abatement and damages, while the other type of litigant could obtain abatement only. A city attorney, in an action, 'brought in the name of the People,' fits squarely and exclusively in the latter classification." Id., 114 Cal.App.3d at 930.

The variance between the Court of Appeal's opinion on the point which Respondents have raised above and ruling case law in California (which the Court of

Appeal's opinion ignored), was framed as Question 2 of the Reasons for Granting a Hearing in the Santa Ana City Attorney's Petition for Hearing filed in the California Supreme Court on March 28, 1982, reading as follows:

> " 2. Whether monetary damages (nominal, compensatory and punitive) may be recovered in a cause of action to abate a public nuisance under Civil Procedure Section 731, brought by the City Attorney at the direction of the City Council."

Petitioner's arguments as to Question 2 of the Reasons for Granting a Hearing appeared as Point II in the Petition for Hearing in the California Supreme Court at pages 33 et seq. A copy of that portion of the record below is set forth at Appendix "C" to this Reply and Supplemental Brief.

Petitioner submits that the record noted above, appearing herein at Appendix "C", does not support the Respondents' defensive proposition set forth in Point IIB of their Brief in Opposition. The Court of

Appeal's opinion, by refusing to acknowledge prior precedent and follow elementary rules of stare decisis, invalidates that portion of the opinion as an ipse dixit expression and a denial of due process of law.

(C) Civil Code Section 3496 Enacted Into Law Subsequent To The Filing Of The Petition For Writ Of Certiorari Herein States In Explicit Language What Implicitly Has Been The Law In California Up To The Decision Of The Court Of Appeal Below And Confirms Petitioner's Arguments That The Trial Court Was Correct In Its Award Re An Attorney's Fee And That The City Attorney Is Entitled To An Award Of Attorney's Fee Under California Civil Code §1021.5 (Private Attorney-General Fee Award).

In the Petition for Writ of Certiorari herein at Point IIA, pp. 56-60, Petitioner contended that that part of the Court of Appeal's opinion which reversed the trial court's judgment relating to attorney's fees was erroneous and that its failure to acknowledge rights accruing to the City Attorney under C.C.P. §1021.5 (private attorney-general fee award) was a denial of equal protection of the law. Specifically,

Petitioner contended that the exclusion in C.C.P. §1021.5 as to "public entities" did not apply where the City Attorney acted as a plaintiff (rather than a defendant) on behalf of the residents in a specific geographical location in an "environmental protection" lawsuit. Further, it was contended that if the interpretation were otherwise, such exclusion constituted a violation of equal protection of the law in that the City Attorney could not be excluded under a "rational" equal protection classification. (See Petition for Writ of Certiorari at pp. 56-62). See Govt. Code §38773 and §38773.5 (Petition for Writ of Certiorari at Appendix F-7, F-8).

Subsequent to the filing of the Petition for Writ of Certiorari herein, the California State Legislature enacted and the Governor has signed into law Senate Bill 1720 which provides as follows:

SECTION 1. Section 3496 is added to the Civil Code, to read:

> 3496. In a case in which the court enjoins the sale, distribution, or public exhibition, for commercial consideration, of obscene matter, as defined in Section 311 of the Penal Code, the court may award costs to the prevailing government agency which brought the action. Such costs may include the costs of investigation and reasonable attorney fees. (Our emphasis.)

Under the decision of the California Supreme Court in Woodland Hills Residents Assn., Inc., supra, Civil Code §3496 applies retrospectively to all cases in which an appeal has not yet been finally determined when the statute becomes effective (Jan. 1, 1983) and therefore applies to this case. Construed in pari materia with C.C.P. §1021.5 and Govt. Code §38773 and §38773.5 (Petition for Writ of Certiorari at Appendix F-7, F-8), as it must, see Sutherland Statutory Construction, Vol. 2A, §51.03, "Statutes deemed to be in pari materia", Civil Code §3496 confirms Petitioner's arguments that the "public entities" exclusion in C.C.P. §1021.5 does not

preclude the award of a private attorney-general attorney's fee in this case and is solid authority for the proposition that such "rights adhere to a governmental unit". (See Brief in Opposition at page 9 where Respondent argues that Petitioner "cites no authority for the proposition that such rights adhere to a governmental unit rather than a individual").

The inclusive right of a city attorney to recover attorney's fees under the private attorney-general concept of C.C.P. §1021.5 is not difficult to understand for that is, in fact, how the city attorney functions in lawsuits involving police matters of statewide interests (obscenity). Under the Common Law, the Attorney-General was the only person authorized to abate public nuisances, Newark Health and Welfare Dept. v. Rogers, 179 N.J.Super. 389, 432 A.2d 135 at 139, People of the State of California v. Beaudry, 91 Cal. 213 at 215, 220 (Sept. 16,

1891). The City Attorney's authorization to perform that function is statutory (see C.C. §5 and §21, C.C.P. §731), as is the City Council's right to assess costs of abatement against the person who is maintaining the public nuisance. See Govt. Code §38773 and §38773.5, appearing in the Petition for Writ of Certiorari at Appendix F-7 and F-8 and Santa Ana Ordinance N.S. 1287 appearing in the Petition for Writ of Certiorari at Appendix B-105 and B-106.

Respondents' argument (see Brief in Opposition at page 9) that:

> ". . . denial of attorney's fees to him is the taking of property without due process of law, which must be one of the more specious arguments to be presented to this court this term."

misstates the argument which is made in Point IIB of the Petition. Point IIB addresses itself to "damages" not "attorney's fees". The argument there is predicated upon the assumption that a moral public nuisance does result in "harm" and

"damage". Since under the Court of Appeal's opinion and ruling California case law, a private property owner cannot recover for the "general" or "special" injury done to his property by the moral public nuisance, see Civil Code §3493 (Petition for Writ of Certiorari at Appendix F-6) and Harmer, et al. v. Deep Throat, 430 U.S. 907; Harmer, et al. v. Devil in Miss Jones, 430 U.S. 937, and the City Attorney cannot recover for the "general injury" done to the Community, it must therefore follow that such harm will go unrecompensed, and the same amounts to a "taking" of property without due process of law.

CONCLUSION

This Court should grant the writ as prayed for in the petition and set the case for oral argument on the merits.

DATED: October 1, 1982

Respectfully submitted,

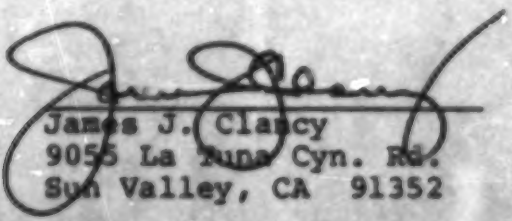
James J. Clancy
Attorney for Petitioner.

CERTIFICATE OF SERVICE

I, hereby certify that on this 4th day of October, 1982, the original and 40 copies of the within Reply and Supplemental Brief were deposited in the United States Post Office in Phoenix, Arizona, with first-class postage prepaid, and properly addressed to the Clerk of the United States Supreme Court.

I further certify that three (3) copies were also mailed, postage prepaid, to the below listed parties to the proceedings and that all parties required to be served have been served.

LAW OFFICE OF ROBERT L. THORP
1524 California Street
San Francisco, California 94109



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APPENDIX A

(Reference: Petitioner's Reply and Supplemental Brief at page 6.)

Point III (pages 10-13) of Petitioner's Reply and Supplemental Brief in People ex rel. Cooper, City Attorney of the City of Santa Ana, California v. Mitchell Brothers' Santa Ana Theater, No. 81-271, filed on Nov. 19, 1981.

. . . . . A-1 thru A-3.

III

AN APPEAL WAS PERFECTED IN U.S. MARKETING, INC. V. STATE OF IDAHO EX REL. KIDWELL, ET AL. ON OCTOBER 15, 1981 AND THAT CASE IS NOW DOCKETED IN THIS COURT AS NO. 81-741. ACCORDINGLY, THE FEDERAL QUESTION AS TO WHETHER AN EQUITY COURT HAS THE POWER TO CLOSE REAL PROPERTY FOR PAST WRONGFUL CONDUCT (AFTER A JUDICIAL DETERMINATION MADE PURSUANT TO CONSTITUTIONALLY ACCEPTABLE PROCEDURES THAT SUCH REAL PROPERTY HAS BEEN USED TO TRADE IN OBSCENITY AS A REGULAR COURSE OF BUSINESS AND IS A PUBLIC NUISANCE) IS NOW SQUARELY BEFORE THIS COURT FOR DECISION.

In its "Reasons for Granting the Writ", see Petition for Writ of Certiorari at page 48, Petitioner asked this Court to exercise its judicial discretion and grant the writ under Rule 17.1(b) of the United States Supreme Court on the ground that:

> ". . . a state court of last resort (California Court of Appeal, Fourth Appellate District, Division 2) has decided a federal question (closure of the premises) in a way in conflict with the decision of another state court of last resort (Idaho Supreme Court . . ."

Petitioner now calls this Court's attention to an intervening matter; i.e., that an appeal was perfected on October 15, 1981

from the Idaho Supreme Court decision referred to in the Petition for Writ of Certiorari, and has been docketed in this Court as U.S. Marketing, Inc. v. State of Idaho ex rel. Kidwell, et al., No. 81-741. In as much as this Court's jurisdiction over appeals is obligatory, see Frankfurter and Landis, The Business of the Supreme Court: A Study in the Federal Judicial System (1972), pp. 257, it would appear that the federal question of "closure" which has been presented to this Court under its discretionary jurisdiction in the Petition for Writ of Certiorari in People of the State of California ex rel. Cooper, City Attorney of the City of Santa Ana, California v. Mitchell Brothers' Santa Ana Theater, et al., No. 81-271 is now squarely before this court for decision in the Idaho appeal. Because both cases present the same issue (closure) and the same factual pattern (application of the injunction procedure is

not an issue on appeal) request is made that this Court exercise its discretion and grant the writ in the California case at the same time that it acts under its obligatory jurisdiction in the appeal from the Idaho Supreme Court decision.

In bringing to the attention of the members of this Court this matter of the perfecting of an appeal in the Idaho case, Petitioner respectfully requests that this Court not rule upon the Petition for Writ of Certiorari herein until it considers the Jurisdictional Statement in the Idaho Supreme Court appeal and that both cases be considered together, under this Court's customary practice of holding related cases on the Court's docket until a definitive decision has been reached, which can be applied to all of the related cases. See Supreme Court Practice, 5th Edition, Stern and Gressman, at page 750.

APPENDIX B

(Reference: Petitioner's Reply and Supplemental Brief at page 12.)

Point III (pages 38-43) of Plaintiff Edward Cooper, City Attorney of Santa Ana's Petition for Hearing in the California Supreme Court, filed on March 28, 1982, titled:

III

BY REFUSING TO ENFORCE THE PROVISIONS OF SANTA ANA ORDINANCE N.S. 1287 AND 1325, WHICH DECLARE THAT A PLACE WHICH PUBLICLY EXHIBITS OBSCENE MOTION PICTURE FILMS AS A REGULAR COURSE OF BUSINESS AND THE POSITIVE MOTION PICTURE PRINTS USED AT SUCH PLACES FOR SUCH EXHIBITIONS ARE PUBLIC NUISANCES, THE COURT OF APPEAL HAS USURPED THE LEGISLATIVE POWER OF THE CITY OF SANTA ANA.

. . . . . B-1 thru B-10.

III

BY REFUSING TO ENFORCE THE PROVISIONS OF SANTA ANA ORDINANCE N.S. 1287 AND 1325, WHICH DECLARE THAT A PLACE WHICH PUBLICLY EXHIBITS OBSCENE MOTION PICTURE FILMS AS A REGULAR COURSE OF BUSINESS AND THE POSITIVE MOTION PICTURE PRINTS USED AT SUCH PLACES FOR SUCH EXHIBITIONS ARE PUBLIC NUISANCES, THE COURT OF APPEAL HAS USURPED THE LEGISLATIVE POWER OF THE CITY OF SANTA ANA.

Having held (erroneously) that the City Attorney, as a matter of law, could not recover damages for a public nuisance under Civil Procedure section 731, the Court of Appeal's original opinion, which is adhered to upon remand, further reasoned that, except for the injunction, "the other remedies granted by the trial court" were unauthorized because "Inconsistent with the language of section 731." In addressing itself to the plaintiff's contrary arguments, the Court's analysis held that the only public nuisance was the exhibition of the obscene films in the theater: (Appendix B-9):

> "The City's arguments to the contrary appear to stem from an erroneous view of what constitutes the public nuisance that may be abated. . . It thus appears that the City believes that it is the theater that constitutes the public nuisance. This in an incorrect reading of the Busch decision. In Busch, the court states that 'the exhibition of obscene magazines and films . . . may be characterized as "indecent" or "offensive to the senses"' (17 Cal.3d at p. 49), talks about 'the state's interests in regulating the exhibition of obscene matter' (id., at p. 51), and concludes that 'public nuisance laws may properly be employed to regulate the exhibition of obscene material to "consenting adults."' (Id., at p. 53, emphasis added.) Thus, the public nuisance is not the theater, nor even the obscene films themselves. It is the exhibition of those obscene films in the theater that constitutes a public nuisance."

The ruling of the Court of Appeal, that the theater itself and the specific motion picture prints used to project the images and sounds at that theater in the City of Santa Ana are not public nuisances, refuses to acknowledge the legislative powers of the Santa Ana City Council and the specific grant of authority to cities in Government Code sections 38771 through 38773.5 to

declare what constitutes a public nuisance in that City and to provide for a procedure to abate such public nuisances. Such ruling is in derogation of Santa Ana City Ordinances N.S. 1287 and 1325 which declare places exhibiting obscene films within the City, and prints used to exhibit obscene films within the City to be a public nuisance, and the Court's refusal to enforce the Santa Ana Ordinances constitutes a usurpation of the legislative power of the City of Santa Ana. See City of Bakersfield v. Miller, 64 C.2d 93, 48 Cal.Rptr. 889 (Feb. 4, 1966), where this Court held, in that regard, at page 894:

> "Where the Legislature has determined that a defined condition or activity is a nuisance, it would be a usurpation of the legislative power for a court to arbitrarily deny enforcement merely because in its independent judgment the danger caused by a violation was not significant. The function of the courts in such circumstances is limited to determining whether a statutory violation in fact exists, and whether the statute is constitutionally valid."

In the City of Bakersfield case, supra, the City had adopted by reference the 1958 edition of the Uniform Building Code, drafted by the International Conference of Building Officials. The complaint filed by the City alleged that the Padre Hotel constituted a fire hazard and a public nuisance as defined by the city ordinance which had been enacted. The defendant did not deny that the ordinance had been violated but contended instead that the city exceeded its legislative powers in declaring as a matter of law that such violations constituted a public nuisance, and maintained that the trial court was required to make an independent finding as to whether the building was in fact a nuisance under state law. The people argued that the statutory definition of Civil Code section 3479 was not exclusive. The trial court agreed with the city's position, holding that it was "a proper function" of the

legislature to define those breaches of public policy which are to be considered public nuisances within the control of equity and concluded that the hotel constituted a fire hazard within the meaning of the uniform code adopted by the city, and that under terms of section 203, subd. (a) of the code it was a public nuisance. Upon appeal, this Court affirmed, holding at page 894:

> "City legislative bodies are empowered by Government Code, section 38771 to declare what constitutes a nuisance. Since even without this section cities would have the power to abate public nuisances (Code Civ. Proc. § 731) and to impose criminal sanctions upon those maintaining public nuisances (Pen. Code, § 373a) It seems evident that Government Code section 38771 does more than permit cities to adopt as municipal ordinances provisions which have already been enacted as state statutes; such an interpretation would make the section superfluous. It may be contended that the section delegates to municipalities only the power to declare as nuisances specific conditions within the general areas of regulation enumerated in Civil Code, section 3479, but we do not reach this question here since a fire hazard clearly constitutes a nuisance within

the provisions of section 3479. (See, e. g., People v. Wing (1905) 147 Cal. 382, 383, 81 P. 1104; County of San Diego v. Carlstrom (1961) 196 Cal.App. 3d 485, 491, 16 Cal.Rptr. 667; Yen Eng v. Board of Building & Safety Comrs. (1960) 184 Cal.App.2d 514, 521, 7 Cal.Rptr. 564; Perepletchikoff v. City of Los Angeles (1959), 174 Cal.App.2d 697, 701, 345 P.2d 261.) Therefore, the City of Bakersfield has the power to define by statute the standards by which courts are to judge whether a nuisance exists, and the trial court did not err in refusing to decide this case on the basis of common law concepts or of the general provisions of Civil Code, section 3479." (Our emphasis.)

The grant of authority of Government Code section 38771, discussed in City of Bakersfield, supra, is clear. Under such section, the City Council, as the city's legislative body has the power to determine what activities within the City of Santa Ana exert a corrupting and debasing impact on the community's health, safety, convenience, good morals, and general welfare under the law of public nuisances and to prescribe with more certainty what constitutes a public nuisance. City of Bakersfield v.

Miller, supra; Barry v. City of Oceanside, 107 Cal.App.3d 257, 165 Cal.Rptr. 697, (June 19, 1980); See 35 Cal.Jur.2d Municipal Corporations, section 237. Acting pursuant to such authority, the Santa Ana City Council enacted Ordinance N.S. 1287 and 1325, treating with particularity the specific public nuisance discussed by the California Supreme Court in t'e Busch case, supra, which voiced the following public policy in 17 Cal.3d 42 at 55:

> "We do not suggest, of course, that law enforcement officers in each city and county in this state have a mandatory duty always and everywhere to abate the exhibition of obscene matter within their borders. The particular nature of the exhibition, and its effect upon the community, may vary considerably in time and place. Law enforcement officers accordingly are vested with wide discretion to decide whether or not to initiate the kind of formal abatement proceedings such as those instituted in the matters before us. (See Code Civil Proc., § 731.) Once a community through its public officials has determined that a particular display of obscene materials amounts to a public nuisance which is injurious to the safety and morals of that community, no valid reason exists

> why, adequate constitutional procedural safeguards being met, the remedy of civil abatement proceedings must be denied such community. The availability of the public nuisance procedure may prove useful for those local entities which, determining that they are confronted with commercial exploitation of obscene materials resulting in the conditions contemplated in section 370, elect to use it." (Our emphasis.)

In People ex rel. Gow v. Mitchell Brothers' Santa Ana Theater, 114 Cal.App.3d 923 at 930, 171 Cal.Rptr. 85 at 89; the Court of Appeal held that:

> ". . . the trial court erred . . . in ordering the destruction of the 11 films found to be obscene."

and at page 931:

> "Thus, the public nuisance is not the theater, nor even the obscene films themselves."

Plaintiff submits such ruling is erroneous in its failure to take into consideration: (1) The legal effect of section 12-102(B) of Santa Ana City Ordinance N.S. 1287, which declares such prints to be a public nuisance per se when exhibited publicly within the City of Santa Ana; and (2) the powers of a

Court of equity to declare a forfeiture of such subject matter as derivative contraband. See State of South Dakota v. Three ISO-2 Devices, 296 N.W.2d 510, 511 (Sept. 3, 1980); U.S. v. U.S. Coin and Currency, 401 U.S. 715; Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663.

The above rule of law fails to recognize and apply the logical distinction, which this Court noted in footnote 10 of its own opinion, between "the private possession of obscene films" and the fact that "obscene films do not become legally objectionable until they are publicly exhibited or distributed". Were such a rule of law to be applied herein, such would require the irrational result reached in the post trial proceedings below which required the plaintiff, after expending substantial moneys on the trial and prevailing on the obscenity issue, to return the obscene films and pay a rental for their use as exhibits

at the trial and upon appeal!

In using the above procedures, the Santa Ana City Council did not, in any way, interfere with statewide legislative matters, and such ordinances are entirely consistent with the public policy expressed in Busch and were valid legislative enactments within the City Council's authority. Under the City of Bakersfield case, supra, the Court of Appeal decision "to arbitrarily deny enforcement" constituted a "a usurpation of the legislative power of the City."

APPENDIX C

(Reference: Petitioner's Reply and Supplemental Brief at page 14.)

Point II (pages 33-38) of Plaintiff Edward Cooper, City Attorney of Santa Ana's Petition for Hearing in the California Supreme Court, filed on March 28, 1982, titled:

II

A CITY ATTORNEY IS EMPOWERED TO RECOVER MONETARY DAMAGES IN A CIVIL ACTION TO "ABATE" A PUBLIC NUISANCE UNDER CIVIL PROCEDURE SECTION 731.

. . . . . C-1 thru C-9.

II

A CITY ATTORNEY IS EMPOWERED TO RECOVER MONETARY DAMAGES IN A CIVIL ACTION TO "ABATE" A PUBLIC NUISANCE UNDER CIVIL PROCEDURE SECTION 731.

The original opinion of the Court of Appeal (as adhered to upon remand) is grounded upon the erroneous conclusion of law that a city attorney cannot recover damages for a public nuisance under Civil Procedure Section 731. See People ex rel. Gow v. Mitchell Brothers' Santa Ana Theater, et al., 114 Cal.App.3d 923 at 930, 171 Cal.Rptr. 85 at 89. That analysis is in error. The statutory history of Code of Civil Procedure Section 731 shows that it was originally enacted into law in 1872 when the Field Code was adopted.[12/] At that time, the generic term "nuisance" was used-- no distinction was drawn between a "public"

12/ For the common law background of the law of "nuisance", see Prosser on Torts (3rd Edition) at page 592; Newark, The Boundaries of Nuisance, 1949, 65 L.Q. Rev. 480, 482; Stephen, General View of the Criminal Law of England, 1890 at 105; and H.G. Wood, The Law of Nuisances, discussed in Cross-Appellant's Opening Brief at page 235 et seq.

nuisance and a "private" nuisance. As enacted in 1872, Code of Civil Procedure Section 731 read:

> "Anything which is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance, and the subject of an action. Such action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by the nuisance; and by the judgment the nuisance may be enjoined or abated, as well as damages recovered."

Section 731 was not amended until 1905.

Prior to 1905, Section 731 had been construed by the California Supreme Court in San Francisco v. Buckman (1896), 111 C. 25, 43 P. 396 to authorize the award of damages to a City Attorney where a public nuisance was shown to exist. In the Buckman case, the City and County Attorney of San Francisco had brought an action to restrain the defendants from tearing up a public street. The trial court found that the acts of the defendant constituted a public

nuisance and that the City was entitled to an injunction. Upon appeal, the California Supreme Court affirmed, holding that, under Civil Procedure Section 731, the City would be entitled to damages:

> ". . . it still is claimed for appellant that the 'proof shows at best only a naked trespass, and against such trespass equity will not grant an injunction.' This proposition cannot be maintained. The proofs show that appellant was committing more than mere trespass; he was unlawfully obstructing the free passage or use, in the customary manner, of a public street of the city, and this, under the provisions of the code, constituted a public nuisance. (Civ. Code secs. 3479, 3480.) And the Code of Civil Procedure expressly provides that a nuisance may be enjoined or abated and damages therefor recovered in the same action. (Civ. Code, sec. 731.)" (Our emphasis.)

In the 1905 amendment, the first sentence of Section 731, containing a definition of "nuisance" (which at that time, under the Field Code, was also contained in Civil Code Section 3479) was dropped from the Civil Procedure statute. To compensate for that omission, the word

"nuisance" in the second sentence was changed to read "nuisance, as the same is defined in section thirty-four hundred and seventy-nine of the Civil Code." In addition a new sentence was added to codify the common law right of the city attorney to bring an action to abate a public nuisance, which had previously been acknowledged in San Francisco v. Buckman as being a part of Section 731. After the 1905 amendment, Section 731 read as it does today:

> §731. (Right to bring action to enjoin or abate nuisance, and to recover damages; Abatement of public nuisance)
>
> An action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by a nuisance as the same is defined in section thirty-four hundred and seventy-nine of the Civil Code, and by the judgment in such action the nuisance may be enjoined or abated as well as damages recovered therefor. A civil action may be brought in the name of the people of the State of California to abate a public nuisance, as the same is defined in section thirty-four hundred and eighty of the Civil Code, by the district attorney of any county in which such nuisance exists, or by the city attorney of any

> town or city in which such nuisance exists, and each of said officers shall have concurrent right to bring such action for a public nuisance existing within a town or city, and such district attorney, or city attorney, of any county or city in which such nuisance exists must bring such action whenever directed by the board of supervisors of such county or whenever directed by the legislative authority of such town or city.

See, also, Johnson v. V.D. Reduction Co., 175 Cal. 63 (1917), where the California Supreme Court held that the 1905 amendment was not intended to change rights which existed prior to the amendment, and was intended only to provide the statutory authority for the institution of civil actions for the abatement of public nuisances by municipal officers, at page 66:

> "Counsel for appellants, conceding, if accepted as the law, the decisive character of the Zumwalt case, attack it upon the ground that, while section 731 of the Code of Civil Procedure, as it then read, in express terms authorized any person whose property is injuriously affected or whose personal enjoyment is lessened by the nuisance defined in section 3479 of the Civil Code, to sue for the abatement thereof, the effect of the amendment thereof, made in 1905, was to

deprive persons so injuriously affected of the right of action. Reference to the amendment shows an added clause, the sole purpose of which was to empower district attorneys and city attorneys of their own motion to institute civil actions for the abatement of public nuisances in counties and cities and to compel them so to do when directed by the legislative authorities of counties and cities. Clearly, it was not the intention of the legislature by enacting the amendment to abridge or affect the rights given by the section prior to the amendment to private persons in maintaining actions for the abatement of nuisances, whether of a private or public nature when the effect thereof seriously impairs their health, abridges their right to personal enjoyment, or renders their dwellings and homes unfit for occupation. Its only purpose was to provide statutory authority for the institution of civil actions for the abatement of public nuisances by municipal officers." (Our emphasis.)

The contrary construction given to Civil Procedure section 731 by the Court of Appeal flies in the face of Civil Procedure section 5 and Civil Code section 5 which require that:

"the provisions of this code, so far as they are substantially the same as existing statutes or the common law, must be construed as continuations thereof, and not as new enactments."

(Our emphasis.)

See, also, Civil Code section 3484, enacted in 1872, which reads:

> "The abatement of a nuisance does not prejudice the right of any person to recover damages for its past existence."

Further, that Court's interpretation that a city attorney cannot recover monetary damages in an action to abate a public nuisance pursuant to Civil Procedure section 731 is contrary to ruling California case law. See People et al. v. City of Los Angeles, 160 C.A.2d 494 (May 15, 1958), petition for a hearing in the California Supreme Court denied on July 11, 1958. In the City of Los Angeles case, the cities of Manhattan Beach and Hermosa Beach brought an action against the City of Los Angeles alleging a public nuisance created within the boundaries of those cities caused by the discharge of sewage into the waters of Santa Monica Bay. There, the Court of Appeal, Second Appellate District, Division Three,

held that damages could be recovered under Civil Procedure section 731, at page 508:

> "The defendant city of Los Angeles attacks each of these causes of action upon the theory that they are causes of action for damages not incidental to the action to abate the nuisance and that inasmuch as there is no allegation that any claim was filed against the city in accordance with the provisions of the Charter of the city of Los Angeles (Los Angeles City Charter, §§363 and 376), a cause of action is not stated.
>
> "Each of the cities has the right to abate a nuisance existing within its boundaries (Civ. Code, §3494) and may by injunctive relief, accomplish such abatement (People v. Selby Smelting & Lead Co., 163 Cal. 84 at 90 (124 P. 692, 1135 Ann.Cas. 1913E 1267), and in any action brought to abate the nuisance, may not only enjoin its continuance, but recover damages. (Code Civ. Proc. §731.) Inasmuch as each of these causes of action, although repetitious insofar as injunctive relief is concerned, is sufficient to state a cause of action for an injunction, it was error to sustain a general demurrer to either. We are not called upon to decide whether any of the facts alleged as constituting damage to the respective cities, do in fact show damages which are recoverable against the city, for this is a question to be decided upon a motion to strike from the pleadings, or upon objections to the evidence thereof when offered. We may say, however, that any proper item of damage which is a direct result of the creation of the

> nuisance and incident to any equitable relief that may be granted, may be recovered in this action even though no claim therefor was filed against the city prior to the institution of the action. (Los Angeles Brick etc., Co. v. City of Los Angeles, 60 Cal.App.2d 478 at 486 (141 P.2d 46); Ingram v. City of Gridley, 100 Cal.App.2d 815 at 818 (224 P.2d 798)." (Our Emphasis.)

See, also, People ex rel. Van de Kamp v. American Art Enterprises, Inc., et al., ___ Cal.App.3d ___, 177 Cal.Rptr. 776 (Oct. 27, 1981). Hearing granted on Feb. 5, 1982.

The statutory analysis set forth above confirms plaintiff's common law analysis in its previous briefs on file with this Court that, under Civil Code section 14 and Civil Procedure section 17, the word "person" as used in Civil Procedure section 731 includes a municipal corporation as well as a natural person.